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KANU SANYAL

v.

DISTRICT MAGISTRATE, DARJEELING & ORS.

September 11, 1973

[A. N. RAY, C.J., D. G. PALEKAR, Y. V. CHANDRACHUD, P. N. BHAGWATI AND V. R. KRISHNA IYER, JJ.]

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Constitution of India, Art. 32—Habeas Corpus—*O.XXXV, rr.* 4 *and* 5 *and O. XLVII. rr.* 1 *and* 6 *of Supreme Court Rules—Whether production of the body of the detenu before the Court essential for the disposal of the petition by the Court.*

The petitioner, an undertrial prisoner, filed a petition under Art. 32 for the issue of writ of *habeas corpus.* The Court issued rule *nisi* but directed that the petitioner need not be produced in person. On the question whether the production of the body of the person detained was essential before the application for a writ of *habeas corpus* could be finally heard and disposed of by the Court,

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HELD : (1) There is nothing in Art. 32 which requires that the body of the person detained must be produced before an application for a writ of *habeas corpus* could be heard and decided by the Court. It is competent for the court to dispense with the production of the body of the person detained while issuing a rule *nisi* under O.XXXV, r. 4 of the Supreme Court Rules and the rule *nisi* could be heard and an appropriate order passed in terms of O.XXXV, r. 5 without requiring the body of the person detained to be brought before the Court. [635F-G]

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(2) In enacting Art. 32(2) the Constitution-makers meant to give to a person illegally restrained of his liberty the same kind of remedy, fashioned and developed over the years in England and the United States. Both on *a priori* reasoning as also on the basis of the practice in England and the United States. the production of the body of the person detained was not a basic or essential requirement of a proceeding for a writ of *habeas corpus.* [633-H]

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The Supreme Court could examine the legality of the detention of the hearing of the rule *nisi* without requiring that the person detained be brought before the Court, and if the detention is found unlawful, order him to be released forthwith. [634-F]

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(3) The same procedure is set out in O. XXXV, rr.4 and 5 read with O. XLVII, rr. 1 and 6 of the Supreme Court Rules. O. XXXV, rr. 1 and 6 of the Supreme Court Rules provides that if on the preliminary hearing the Court is of opinion that a *prima facie* case for granting the petition is made out, a rule *nisi* shall issue calling upon the respondent to appear and show cause why the order sought, namely, order for release of the person detained, should not be made and at the same time to produce in Court the body of the person detained "then and there to be dealt with according to law". But O. XLVII, r. 1 empowers the Court, for sufficient cause shown, to dispense with the requirements of O. XXXV, r. 4 and the Court may direct in an appropriate case that the body of the person detained need not be produced in Court at the hearing of the rule *nisi.* The same is the effect of O. XLVII, r. 6. Where such a direction is given the Supreme Court would hear the rule *nisi* without the person detained being brought before it and, as provided in O. XXXV, r. 5 "If no cause is shown or if cause is shown and disallowed" pass an order that the person detained be set at liberty and "if cause is shown and allowed" discharge the rule nisi. [634-G-H; 635 A-B]

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(4) Though the petitioner had a fundamental right under Art. 3 and the Supreme Court is bound under Art. 32(2) to issue appropriate direction, order or writ for enforcement of such fundamental right, there is no obligation on it to

give any particular kind of remedy to the petitioner. What should be the appropriate remedy to be given is a matter for the Court to decide under Art. 32(2). In cases of this nature the Court may say that it is not necessary for the petitioner to be produced before the Court and that it would be sufficient and appropriate instead to examine the validity of the detention without having him brought before the Court, and if the detention is found to be lawful, pass an order setting him at liberty. [635 C-D]

[Nature and history of the writ of *habeas corpus* examined]

ORIGINAL JURISDICTION : Writ Petition No. 205 of 1973.

Under Article 32 of the Constitution of India for issue of a writ in the nature of *habeas corpus.*

R. K. Garg, for the petitioner.

P. K. Chatterjee and *G. S. Chatterjee,* for respondents Nos. 1 and 5.

P. Ram Reddy and *P. P. Rao,* for respondent No. 6 and for the State of Andhra Pradesh.

B. D. Sharma and *S. P. Nayar,* for respondent No. 7.

The Judgment of the Court was delivered by

BHAGWATI, J. The short question that arises for determination in this petition under Art. 32 of the Constitution is whether the production of the body of the person alleged to be unlawfully detained is essential before an application for a writ of *habeas corpus* can be finally heard and disposed of by the Court. The question is of some importance, affecting as it does the practice and procedure to be followed in an application for a writ which has come to be universally recognised as the most effective protection invented by Anglo Saxon jurisprudence against wrongful deprivation of personal liberty. It is not necessary for a proper determination of the question to recount the facts giving rise to the petition, nor is it necessary to set the grounds on which the petitioner contends that he has been illegally restrained of liberty. It would be sufficient to state that the petitioner filed the petition for a writ of *habeas corpus* contending that he has been wrongfully deprived of liberty and that he should be released forthwith from his confinement. The petition was forwarded to this Court by the petitioner from the Central Jail, Visakhapatnam where he is detained as an undertrial prisoner pursuant to the remand granted from time to time by the Special Magistrate, Visakhapatnam before whom committal proceedings are pending against him in P.R.C. Nos. 1 and 2 of 1971. When the petition came up for preliminary hearing on 2nd April, 1973, Mr. Garg appeared on behalf of the petitioner with the permission of the Court, and after hearing him the Court made an order for the issue of *rule nisi,* but directed that there should be no personal production for the present. Three affidavits in reply were filed in answer to the *rule nisi,* one by respondent Nos. 1 and 5, the other by respondent No. 6 and the third by respondent No. 7. When the petition reached hearing before the learned Vacation Judge, Mr. Garg, appearing on behalf of the petitioner, raised a contention that the petition could not be heard by the

A Court unless the petitioner was produced in person and in support of this contention he relied on Order XXXV, r. 4 of the Supreme Court Rules, 1966. The learned Vacation Judge felt that the question raised by Mr. Garg was an important one and it should be decided after hearing the State of Andhra Pradesh since it was that State which was holding the petitioner in custody in the Central Jail, Visakha-patnam, and he accordingly directed notice to be given to the State B of Andhra Pradesh. The State of Andhra Pradesh filed an affidavit in reply and appeared at the hearing of the petition before a Division Bench of this Court on 25th July, 1973. The Division Bench took the view that the contention raised by Mr. Garg that the nonproduction of the petitioner in an application for a writ of *habeas corpus* is violative of his rights under Art. 32 of the Constitution was one required to be C decided by the Constitution Bench and that is how the matter is now before us for determination of this contention.

The argument urged by Mr. Garg on behalf of the petitioner in support of his contention proceeded on the following lines. Mr. Garg contended that the case of the petitioner was that he was unlawfully confined in jail in contravention of Art. 21 and he was, therefore, D entitled under Art. 32 to move the Supreme Court for a writ of *habeas corpus* to enforce the fundamental right of personal freedom guaranteed to him under Art. 21. The right to obtain relief by way of a writ of *habeas corpus* was, according to Mr. Garg, a fundamental right of the petitioner and since the production of the body of the person alleged to be illegally detained is an essential feature of writ of *habeas corpus*, the petitioner was entitled to claim that he should E be produced before the Court before his petition for a writ of *habeas corpus* could be disposed of by the Court. It was conceded by Mr. Garg that if no *prima facie* case is shown by the petitioner that he is unlawfully detained, the petition may be dismissed *in limine*. But he contended that if a *prima facie* ground is shown and a *rule nisi* is issued, the body of the person alleged to be wrongfully confined must be produced along with the return. The Court cannot, it was said, pro- F ceed to inquire into the legality of the detention unless the body of the person alleged to be wrongfully detained was produced before the Court. If the Court, on return being filed by the respondent, proceeds to examine the legality of the detention without insisting on the production of the body of the person alleged to be wrongfully detained and, on finding that the detention is unlawful, orders release of the person wrongfully detained, that would undoubtedly give relief but G that would be some other relief and not a writ of *habeas corpus*. That is not what the petitioner has sought here nor is it what the petitioner claims to be entitled to. The petitioner has sought a writ of *habeas corpus*, that is his fundamental right under Art. 32 and that requires that the body of the petitioner must be produced when the legality of his detention is inquired into by the Court. Mr. Garg relied heavily on Order XXXV, r. 4, which is in the following terms : H

> "The petition shall be posted before the Court for preliminary hearing, and if the Court is of the opinion that a *prime facie* case for granting the petition is made out, a

> *rule nisi* shall issue calling upon the person or persons against whom the order is sought, to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law."

The *rule nisi* contemplated in O. XXXV, r. 4, said Mr. Garg, is nothing but the writ of *habeas corpus* which issues when a *prima facie* case is made out by the petitioner and it requires the respondent to produce in Court the body of the person alleged to be wrongfully detained. Order XXXV, r. 5 lays down the procedure to be followed at the hearing of the *rule nisi* and that is the same procedure which is followed on the return to the writ of *habeas corpus*. That procedure is, to quote O. XXXV, r. 5 :

> "On the return day of such rule or any day to which the hearing thereof may be adjourned if no cause is shown or if cause is shown and disallowed, the Court shall pass an order that the person or persons improperly detained shall be set at liberty. If cause is shown and allowed, the rule shall be discharged. The order for release made by the Court, shall be a sufficient warrant to any gaoler, public official, or other person for the release of the person under restraint."

Mr. Garg had to concede that O. XLVII, r. 1 gives dispensing power to the Court, for sufficient cause shown, to "excuse the parties from compliance with any of the requirements of these rules" and to "give such directions in matters of practice and procedure as it may consider just and expedient" and O. XLVII, r. 6 enacts an overriding provision that nothing in the rules "shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court", but his argument was that production of the body of the person alleged to be wrongfully restrained being an essential feature of a writ of *habeas corpus* and the right to obtain a writ of *habeas corpus* being a fundamental right of the petitioner, it would be a part of the fundamental right of the petitioner to insist that he should be produced in person before the Court and O. XLVII, rr. 1 and 6 cannot be read so as to curtail or limit this fundamental right. No rules can be framed by the Court, contended Mr. Garg, which would destroy the basic and essential feature of a writ of *habeas corpus*, because the right to obtain a writ of *habeas corpus* is a fundamental right under Art. 32. The submission of Mr. Garg, therefore, was that it was not competent to the Court to direct that the petitioner need not be produced in person at the hearing of the *rule nisi* and the production of the person of the petitioner was essential before the petition could be finally disposed of by the Court.

We do not think this submission is well founded. It proceeds on a misapprehension of what are the basic and essential features of a

A writ of *habeas corpus* as it has developed over the centuries in the country of its origin and as it is administered in the countries governed by Anglo Saxon jurisprudence. The writ of *habeas corpus* is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity and the first threads of its origin are woven deeply within the "seamless web of history" and they are B concealed and perhaps untraceable among countless incidents that constitute the total historical pattern. Earl of Birkenhead described it in his speech in the *Secretary of State* v. *O' Brien*(1) as "a writ antecedent to statute, and throwing its roots deep into the genius of our common law." Originally, in its earliest period, during the twelfth and thirteenth centuries the writ of *habeas corpus* was used in *mesne* process and it was merely a command by the court to some one to C bring before itself the body of a person whose presence was required for purpose of a judicial proceeding. This simple character of the writ as a special kind of summons remained un-altered till the first decades of the fourteenth century. Pursuant to the writ, parties were brought before the Court, whether such parties were free or in detention, at the time of the issuance of the writ. When the 'body' named in the writ was delivered to the court, the duties of the Sheriff or other D directed person were at an end. Until this time there was no mention in the writ of production accompanied by a statement as to the cause of detention. Indeed, in most cases, the writ was aimed at persons not in custody but at large. But obviously a writ by which a court could bring persons before it can be used for many different purposes and the genius of the English people found a way of using it for a different end. The courts of common law started using the writ of *habeas* E *corpus* for extending their jurisdiction at the expense of the rival courts. The writ of *habeas corpus cum causa* made its appearance in the early years of the fourteenth century. It not merely commanded the Sheriff to 'have the body' of the person therein mentioned like its predecessor but added the words 'with the cause of the arrest and detention'. The person who had the custody of a prisoner was required by this writ to produce him before the Court together with the ground F for the detention. The writ thus became a means of testing the legality of the detention and in this form it may be regarded as the immediate ancestor of the modern writ of *habeas corpus*. The writ of *habeas corpus cum causa* was utilised by the common law courts during the fifteenth century as an accomplishment of the writs of *certiorari* and privilege to assert their jurisdiction against the local and franchise G courts. But towards the end of the fifteenth century the machinery of the writ of *habeas corpus cum causa* was turned to a new use. The courts of common law started asserting their jurisdiction against the rival central courts such as the Chancery, the Exchequer, the Ecclesiastical courts, the Council, the Star Chamber, the admiralty and the High Commission and in this struggle for supermacy between the combatant courts, the writ of *habeas corpus cum causa* came to H be a most effective weapon in the hands of the common law courts. The reason why it became so may be explained by quoting the follow-

(1) [1923] A. C. 603.

ing passage from the article of Maxwell Cohan on *"Habeas Corpus Cum Causa"* in 18 *Canadian Bar Review at* page 20 : A

> "The struggle took the form of the assertion of jurisdiction on the part of combatant courts over matters as well as persons. Now the *corpus cum causa* was essentially a personal writ in the sense that the person of the party named was the subject matter to be had and dealt with by the court. It will at once be apparent that if the Chancery or Exchequer or the special courts could not retain control over the bodies of parties and suitors before them and, further, could not control their actions upon the determination of the suit so as to ensure execution of their judgments, their power would be seriously impaired. This was precisely what the King's Bench and Common Pleas had in mind when they issued writs of *habeas corpus* to applicants held under the process of some rival tribunal." B C

The common law courts thus used the writ of *habeas corpus* to protect, assert and extend their own jurisdiction against the various rival courts by securing the release of litigants and others from custody. By means of this writ they brought before themselves and released persons who had been imprisoned by one of the rival courts if, in their opinion, the court had acted in excess of its jurisdiction. The writ of *habeas corpus,* known in this form *as habeas corpus ad subliciandum,* thus came to be a writ by which a person unlawfully imprisoned could secure his release. In this way it assumed great constitutional importance as a device for impugning the validity of arbitrary imprisonment by the executive and, as pointed out by Holdsworth in vol. I of his *"History of English Law,"* "its position as the most efficient protector of the liberty of the subject was unquestioned after the Great Rebellion". It was for this reason that men began to assign as its direct ancestor the clauses of the Magna Carta which prohibited imprisonment without due process of law. The history of the writ which we have given shows that there is no direct descent but there can be no doubt that there is an indirect connection between the writ and the Magna Carta, because, far more effectively than any other remedy, the writ helped to vindicate the right of freedom guaranteed by the famous words of the Magna Carta. The decision in *Darnel's case*(1) was a set-back in the struggle for liberty since it eroded to some extent the effectiveness of the writ by taking the view that a return that the arrest was "by the special command of the King" was a good and sufficient return to the writ, which meant that a lawful cause of imprisonment was shown. But the Petition of Right, 1627 overruled this decision by declaring such a case of imprisonment to be unlawful. In the same way, it was enacted in the Habeas Corpus Act, 1640 abolishing the Star Chamber that any person committed or imprisoned by order of the Star Chamber or similar bodies or by the command of the King or of the Council shou'd have his *habeas corpus.* There were various other defects also which were revealed in course of time and with a view to remedying those defects D E F G H

(1) (1627) 3 State Trials 1.

A and making the writ more efficient as an instrument of securing the liberty of the subject unlawfully detained, reforms were introduced by the Habeas Corpus Act, 1679, and when even these reforms were found insufficient, the Habeas Corpus Act, 1816 was enacted by which the benefit of the provisions of the Habeas Corpus Act, 1679 was made available in cases of civil detention and the judges were empowered to inquire into the truth of the facts set out in the return to the writ. The B machinery of the writ was thus perfected by legislation and it became one of the most important safeguards of the liberty of the subject and, as pointed out by Lord Halsbury L.C., in *Cox* v. *Hakes,*(1) it has throughout "been jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

C It will be seen from this brief history of the writ of *habeas corpus* that it is essentially aprocedural 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 D 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, E 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 underlined 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 F 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,*(1) "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; G 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 H law could assert their jurisdiction by removing parties from the control of the rival courts and thereby impairing the power of the rival

(1) [1890] 15 A. C. 506.

courts to deal with the causes and persons before them. The common law courts could not effectively order release of the persons 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 of substance? Why should we hold ourselves in fetters by a practice which originated in England about three hundred years ago an 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*.

In England it is well settled as a result of several decisions that the writ of *habeas corpus* is not granted as of course as would an original writ for initiating an action. It is issued only on probable cause being shown by an affidavit either of the person detained or of some other person on his behalf. The applicant for the writ must show *prima facie* that he is unlawfully detained. If he cannot show *prima facie* that there is sufficient ground for his discharge the writ would not issue and his application would be summarily rejected. Now, up to the end of the eighteenth century the procedure that was followed in application for the writ of *habeas corpus* was that when the applicant made out a *prima facie* case of an unlawful detention he would be entitled to issuance of the writ as of right. In obedience to the writ the respondent would produce the person detained before the court and file a return showing the cause of detention. At the hearing on the date named oral argument would take place, the burden of proving lawful justification for the detention being on the respondent. If no legal ground was made to appear justifying detention, the person detained would be immediately discharged. On the other hand, the application would be dismissed if the detention was shown to be justified. But this procedure led to the inconvenience of unnecessarily

A bringing up the body of the person detained, sometimes from a long distance in case where it might ultimately be found, when correct facts are placed before the court by the respondent in the return filed by him, that the detention was perfectly lawful and the applicant had no case at all and the writ need not have issued. The practice, therefore, started—it is difficult to say precisely when, but the earliest reported B instance of it is to be found in the year 1784 (see *Wade's* case reported in the note to *Blake's case*(1) of issuing rule *nisi* in the first instance. If the applicant made out a *prima facie* case of unlawful detention, a *rule nisi* would issue to the respondent and on the *rule nisi* the case wold be argued on the merits and if the court holds the detention illegal, there would be rule absolute for the issue of the writ and the body would be brought up and discharge ordered. This C of-course does not mean that in no case would a writ issue on an *exparte* application. The court could always issue a writ forthwith on the *exparte* application, but this power would not ordinarily be exercised except in an urgent case or when time is of importance or where there is a likelihood that delay may defeat justice, as for example, it is apprehended that the person detained may be removed outside the jurisdiction. (see Halsbury's *Laws of England*, vol. 11. D page 39, para 72, and *Be Amand*(2). Now, where is rule nisi is issued which is the normal event, and on the hearing of the *rule nisi*, the court finds that the detention is unlawful, it would be superfluous to issue a writ requiring the production of the body of the person detained in order merely to release him from detention, when he can even otherwise be effectively released without requiring such production. In fact in many cases the person detained would be able to obtain E his actual release much earlier if an order of release were passed by the court on the hearing of the *rule nisi* than he would be able to obtain if a writ is issued, he is produced before the court on the day named in the writ and an order of release is passed on that day. The practice was, therefore, adopted not to go through the formality of the writ but to straight away order the release of the person detained, if, on the hearing of the *rule nisi*, it was found that the detention was F unlawful. In *Eggington's case*(3) on an application made by one J. Grey for a writ of *habeas corpus* to secure the release of Alfre Eggington alleged to be unlawfully detained a rule was issued by the court calling on the respondent to show cause why a writ of *habeas corpus* should not issue directed to the keeper of the jail at Stafford commanding him to have the body of Alfred Eggington before the court immediately to undergo and receive etc. and why in the event G of the rule being made absolute, Alfred Eggington should not be discharged out of the custody of the said keeper without the writ actually issuing or Alfred Eggington being personally brought before the court. The respondent raised an objection that the rule could not be issued in this form. Lord Campbell negatived the objection stating "I have repeatedly granted it—in this form—in order to avoid the H necessity of bringing up the party" So also in *Geswood's* case(4) the

(1) 2 M. & S. 428. (2) [1941] 2 K B. 239.

(3) 2 E. L. & B. L. 717=119 E. R. 936. (4) 2 E. L. & B. L. 952=118 R. B. 1222.

same kind of rule was issued by the court and the cause of detention shown in the return being insufficient the court made the *"rule absolute to discharge the prisoner"*. This practice found recognition in the Crown Office Rules, 1886 which were made under the Judicature Act, 1875 to govern the practice and procedure on the Crown Side of the King's Bench Division. We need not refer to the specific provisions of the Crown Office Rules, 1886 relating to application for a writ of *habeas corpus,* because they were identical with the corresponding provisions of the Crown Office Rules, 1906 which superseded the Crown Office Rules, 1886. Speaking of an application for a writ of *habeas corpus,* rules 217 and 218 of the Crown Office Rules, 1906 provided :

> "R. 217. If made to the Court, the application shall be by motion for an order, which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance; or if the Court so direct they may grant an *order nisi.*
>
> R. 218. If made to a judge he may order the writ to issue *ex parte* in the first instance, or may direct a summons for the writ to issue."

Rule 225 then proceeded to state that "On the argument of every order *nisi* or summons at Chambers for a writ of *habeas corpus* the Court or Judge may, in its or his discretion, direct an order to be drawn up for the prisoner's discharge, which order shall be a sufficient warrant to any gaoler or constable or other person for the discharge of the prisoner or any infant or person under restraint." It is thus evident that if, on the hearing of the *rule nisi* or summons, it was found that the detention was unlawful, the person detained would be released forthwith without requiring him to be brought before the court. The validity of this practice was assailed before the House of Lords in *Cox v. Hakes* (*supra*) and it was contended that it was not competent to the High Court to discharge the prisoner without having him first brought before the Court, and rule 244 of the Crown Office Rules, 1886, corresponding to rule 225 of the Crown Office Rules, 1906 which gave sanction to such a course, was *ultra vires*. Lord Herschell repelled this contention pointing out that the respondent had failed to satisfy him that the rule was *ultra vires* and that there was nothing to show that the presence of the "person whose custody was in question was essential to the jurisdiction of the High Court to discharge him". The Crown Office Rules, 1906 were revoked and so far as they related to the practice and procedure in regard to application for a writ of *habeas corpus,* they were incorporated in Order LIX as rule 1 clause (c) and rules 14 to 23 by the Rules of the Supreme Court (Divisional Courts) 1938. No substantial change was made in the practice and procedure save and except that instead of *rule nisi* and order *nisi,* the new rules provided that when an application for a writ is made and *prima facie* grounds are shown, the court or Judge may direct that notice of motion be given or summons be taken out for issuance of the writ or the application be adjourned so that notice

A thereof may be given to the respondent. (see r. 16). Rule 19 corresponded to former r. 225 and was almost in the same terms as that rule with only some minor consequential changes. The entire rules of the Supreme Court were thereafter revised and rewritten and passed and issued as one complete integral body of Rules under the title "The Rules of the Supreme Court, 1965". These are the Rules now in force in England. Order LIV of these Rules embodies the rule relat-
B ing to application for a writ of *habeas corpus*. Here again we do not find any substantial change and the practice and procedure remains basically the same as it was before. Rule 4(1) is in almost identical terms as the earlier r. 19 and provides that where the court or the judge hears the application after notice of motion or summons or notice of the application is served on the respondent, the court or the
C judge may in its or his discretion order that the person restrained be released and such order shall be a sufficient warrant to any governor of a prison, constable or other person for the release of a person in restraint. The editors of the Supreme Court Practice commenting on this rule say at page 765 :

> "At the hearing an order may be made for the writ to issue in accordance with r. 5, but a modern practice has
D grown up of making an order for release as provided by r. 4—, in which case the writ is not fofmally issued: the Master of the Crown Office writes to the prison governor directing the discharge of the prisoner, and the return to the writ need not show the cause of detainer but merely the fact of release."

E Wade and Phillips also in their *Constitutional Law* (8th ed.) at page 492 described the modern practice and procedure in an application for a writ of *habees corpus* in the same terms :

> "If *prima facie* grounds are shown, the Court or Judge ordinarily directs that notice of motion be given or a summons issued. Argument on the merits of the application
F then takes place on the day named. If the Court decides the writ should issue, it orders the release of the prisoner or the handing over of the infant to the applicant, and this order is sufficient warrant for the release. Under this practice there is no need to produce the prisoner in court at the hearing and no return to the writ is actually made."

G It is, therefore, evident that even in England, which is the country where the writ of *habeas corpus* originated, the superfluity of issuing the writ has been discarded and a pragmatic approach has been adopted which is concerned more with the substance of the remedy than its form.

We find that in the United States also the same practice is followed in an application for a writ of *habeas corpus*. The earliest case on the
H point is to be found in *Exparte Tobias Watkins*.(1) In this case on an application for a writ of *habeas corpus*, a rule was served on the

(1) (1833) 7 pet. (U. S.) 568; 8 L. Ed. 786.

Attorney-General to show cause why the application should not be granted and the cause was fully argued upon the return of the rule. The Court delivering its judgment said : "It is admitted that all the facts existing in the case have been laid before the court exactly as they would appear if the *habeas corpus* had been duly awarded and returned; so that the judgment which the courts are called upon to pronounce, is precisely that which ought to be pronounced upon a full hearing upon the return to the writ of *habeas corpus* : and it has accordingly been so argued at the bar", and held that the applicant was entitled to be discharged from confinement. Similarly in *Exparte Yarbrough*(1) a writ of *habeas corpus* was prayed for on the ground that the applicant's trial, conviction and sentence in the Circuit Court of the United States for the District of Alabama were illegal, null and void. The Supreme Court issued a *rule nisi* to show cause why the writ of *habeas corpus* should not issue for the release of the detenu. The Superintendent of Alabama Penetentiary filed a return showing that the applicants were held prisoners by virtue of the sentence of the Circuit Court on the hearing of the rule proceeded to examine whether the detention of the applicants was lawful. The Supreme Court did not say that until the applicants are produced before them, they would not be competent to inquire into and determine the legality of the detention. The Supreme Court, on the contrary, said : "As this return is precisely the same that the Superintendent would make if the writ of *habeas corpus* had been served on him, the Court here can determine the right of the prisoners to be released on this rule to show cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the Superintendent," and pointed out that "such is the practice of this court." The Supreme Court also observed in an oft quoted passage from the judgment in *Walker* v. *Johnston* :(2) "Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right——". It would thus be seen that according to the practice in the United States a *rule nisi* is issued in the first instance and on the hearing of the *rule nisi*, the legality of the detention is inquired into and determined without requiring the production of the prisoner detained, and if the production is found unlawful, an order of discharge is made sometimes accompanied by an order for issue of a writ of *habeas corpus* and sometimes without it. The issue of the writ of *habeas corpus* is, of-course, an idle formality.

(1) (1884) 110 U. S. 651; 28 L. Ed. 274. (2) 312 U. S. 275; 85 L. Ed. 830.

A for, if the person detained is set free in compliance with the order of release, there can be no return to the writ. We find an accurate summary of the legal position set out in *Corpus Juris Secundum*, vol. 39, page 659, para 93 :

> "In general the body of the person detained must be produced with the writ; but production in court of the person
B detained is not a prerequisite to jurisdiction and in a proper case may be excused or dispensed with.
>
> In accordance with the command of the writ, and the governing statutes, the body of the person detained must be produced with the return before the court or judge issuing the writ. Production in court of the person detained is not
C a prerequisite to the jurisdiction of the court to determine the question involved. He need not be produced unless the court deems his presence necessary. Production of the prisoner bodily may be excused or dispensed with where it appears that for any reason the production of the body is impossible, impracticable, or improper,—"

D The practice followed in the United States of releasing a person found to be illegally detained without requiring him to be brought before the Court discloses a pragmatic approach to the problem, for, it concerns itself more with the accomplishment of the primary purpose of the proceeding than with compliance with its superfluous element.

E This was the practice and procedure in an application for a writ of *habeas corpus* and this is how the jurisdiction in regard to writ of ***habeas corpus*** was exercised by the courts in England as well as in United States when the Constitution makers framed Art. 32 of the Constitution. It is, therefore, reasonable to assume that when the Constitution makers provided in Art. 32(2) that the Supreme Court shall have power *inter alia* to issue a writ in the nature of *habeas corpus*, they had in mind the writ of *habeas corpus* as
F administered in England and the United States at that time. The Constitution makers could never have intended that while dealing with an application for a writ of *habeas corpus* under Art. 32, the Supreme Court should shut its eyes to the development in the law in regard to the writ of *habeas corpus* in the last two hundred years in the country of its origin and the manner in which the jurisdiction in regard to the writ of *habeas corpus* is exercised in the country of its
G adoption across the Atlantic, and ignoring the facts of history, allow itself to be petrified in the age of the Tudors and the Stuarts when the writ was struggling to emerge as an effective weapon in the protection of personal liberty. There can be no doubt that in enacting Art. 32(2) the Constitution makers meant to give to person illegally restrained of his liberty the same kind of remedy, fashioned and developed over the years, which is counterpart enjoyed in England and
H the United States. It would indeed be highly anomalous and strange that when in England and the United States the remedy by way of a writ. of habeas corpus is shown of its superfluous element and made

more convenient and effective from a functional view point by dropping the requirement of production of the person detained, we in India should still hold ourselves bound by the old form of procedure and pay homage to a superfluity which has been discarded a long ago in those two countries. Why should the ghost of the past and that too not ours but that of another country—be allowed to countinue to haunt us and cloud our vision of rationality. It has been held by this Court in *T. C. Basappa* v. *T. Nagappa & Anr.* (1) that "in view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *dertiorari* in all appropriate cases and *in appropriate manner*, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law." (the underlining is ours) When we find, both on *a priori* reasoning as also on the basis of the practice in England and the United States, that the production of the body of the person detained is not a basic or essential requirement of a proceeding for a writ of *habeas corpus*—it is a superfluous element which can be discarded without effecting the utility and effectiveness of the remedy—there is no reason or justification why we should insist upon it while dealing with an application for a writ of *habeas corpus*. The broad and general principles that regulate the exercise of jurisdiction to issue a writ of *habeas corpus* in English law have been discussed by us and they do not require that the body of the person detained must be produced before the legality of the detention can be inquired into and determined by the court. We must, therefore, hold that while dealing with an application for a writ of *habeas corpus* under Art. 32, the Supreme Court may not require the body of the person detained to be brought before the Court. The production of the body of the person detained is not essential to the jurisdiction of the Supreme Court to deal with the application. The Supreme Court can examine the legality of the detention on the hearing of the *rule nisi* without requiring that the person detained be brought before the Court, and if the detention is found unlawful, order him to be released forthwith. This, in fact, is the procedure set out in order XXXV, rr. 4 & 5 read with Order XLVII, rr. 1 and 6 of the Supreme Court Rules. Order XXXV, r. 4 provides that if on the preliminary hearing the Court is of opinion that a *prima facie* case for granting the petition is made out—and granting the petition would mean passing an order of release of the person detained—a *rule nisi* shall issue calling upon the respondent to appear and show cause why the order sought, namely, order for release of the person detained, should not be made and at the same time to produce in Court the body of the person detained "then and there to be dealt with according to law". It would appear that according to this Rule the body of the person detained must be produced in Court on the day fixed for the hearing of the *rule nisi*. But Order XLVII, r. 1 empowers the Court, for sufficient cause shown, to dispense with this requirement of Order XXXV.

(1) [1955] S. C. R. 250.

A r. 4 and the Court may direct in an appropriate case that the body of the person detained need not be produced in Court at the hearing of the *rule nisi*. The same is the effect of Order XLVII, r. 6. Where such a direction is given, the Supreme Court would hear the *rule nisi* without the person detained being brought before it and, as provided in Order XXXV, r. 5, "if no cause is shown or if cause is shown and disallowed" pass an order that the person detained be set at liberty, and B "if cause is shown and allowed" discharge the *rule nisi*. That would be exactly in accord with the manner in which the jurisdiction in regard to an application for a writ of *habeas corpus* is exercised in England and the United States. We fail to see how that can be regarded as in any way contradictory or violative of Art. 32 of the Constitution. Moreover, it may be noticed that though the petitioner has a fundamental right under Art. 32(1) to move the Supreme Court by appro- C priate proceeding for enforcement of any of his fundamental rights guaranteed under Part III and the Supreme Court is bound under Art. 32(2) to issue appropriate direction order or writ for enforcement of such fundamental right, there is no obligation on the Supreme Court to give any particular kind of remedy to the Petitioner. What should be the appropriate remedy to be given to the petitioner for enforcement of the fundamental right sought to be vindicated by him D is a matter for the Supreme Court to decide under Art. 32(2). The Supreme Court may, in the exercise of its power under Art. 32(2). say that in order to give relief to the person detained for enforcement of his personal freedom, it is not necessary to go through the idle formality of requiring him to be produced before the Court and that it would be sufficient and appropriate instead to examine the validity E of the detention without having being brought before the Court, and if the detention is found to be unlawful, pass an order setting him at liberty.

We are, therefore, of the view that there is nothing in Art. 32 which requires that the body of the person detained must be produced before an application for a writ of *habeas corpus* can be heard and F decided by the Court. It is competent to the Court to dispense with the production of the body of the person detained while issuing a *rule nisi* under Order XXXV, r. 4 and the *rule nisi* can be heard and an appropriate order passed in terms of Order XXXV, r. 5 without requiring the body of the person detained to be brought before the Court. This was the only question before us and now that it is determined the petition will have to go back to the appropriate Bench for G disposal according to law.

P.B.R.