AFR

Reserved

Court No. - 45

Case :- HABEAS CORPUS WRIT PETITION No. - 223 of 2023

Petitioner :- Smt. Zainab Fatima @ Rubi And 2 Others
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Abhishek Kumar Mishra,Khan Saulat Hanif,Ravindra Sharma,Shadab Ali,Vijay Mishra
Counsel for Respondent :- G.A.

Hon'ble Vivek Kumar Birla,J.
Hon'ble Surendra Singh-I,J.

(Delivered by Hon’ble Vivek Kumar Birla, J.)

1. Heard Sri D.S. Mishra, learned Senior Counsel for the petitioners assisted by Abhishek Kumar Mishra, Sri Ravindra Sharma, Sri Sadab Ali, Sri Ravindra Sharma and Sri Vijay Mishra, learned counsels and Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned AGA-I for the State-respondents.

2. We have heard learned counsel for the parties at length on preliminary objection that present petition is no longer maintainable as admittedly the petitioners have been released on personal bonds and they are not in illegal detention and in such case the petition has become infructuous.

3. Per contra, learned Senior Counsel for the petitioners disputed the same and submitted that even if petitioners are not in physical custody, the petition is still maintainable and has not been

rendered infructuous as their movements are restricted due to personal bonds executed by them for their release.

4. Present petition has been filed seeking direction to the respondents to produce the corpus before this Hon'ble Court and set them at liberty forthwith.

5. Submission of learned Senior Counsel for the petitioners is that the petitioner nos. 2 and 3 are permanent resident of H.No. 52, Bhawani Nagar, Hapur Road, Meerut and being close relative of petitioner no. 1, who came at the house of the petitioner no. 1 from district Meerut and on 1.3.2023 petitioner nos. 2 and 3 were present at the house of the petitioner no. 1; petitioner nos. 1 and 2 are housewives and petitioner no. 3 is the minor daughter of the petitioner no. 2; at present, husband of the petitioner no. 1, namely, Khalid Azeem @ Ashraf (Ex-MLA) is in jail at District Jail-II, Bareilly and such the petitioner no. 1 is living at her Maika / parental house along with four minor children at Village Hatwa, Police Station Puramufti, District Prayagraj; on 1.3.2023 the petitioners were present at their house and on the said day at about 01:00 A.M. the police personnels of Police Station Puramufti and Dhoomanganj along with Special Task Force and Crime Branch Team raided the parental house of petitioner no. 1, where all the petitioners were residing breaking the front wall and the main door of the house even though no males were present in the house. The police personnel took rifle on forehead of petitioner no. 1 and also beaten the petitioners and other family members of the house with batons and sticks and also harassed the children at midnight. The petitioner no. 1 having four minor children who were all crying upon their mother being taken by the police; the police personnels of Police Station Puramufti and Dhoomanganj came at the parental house of the petitioner no. 1 without lady police and forcibly

entered into the house of the petitioners after breaking wall and doors of the house and forcibly/illegally taking away the petitioners in their illegal custody in the night without showing any summon, warrant or any other documents; the police authorities arrested the petitioners being women in violation of Section 46(4) Cr.P.C.; the police personnels of the Police Station Puramufti and Dhoomanganj forcibly taking the petitioners into their illegal custody without disclosing the reason of their arrest/confinement; the petitioners are innocent lady and they are not involved in any case at any police station of district Prayagraj and district Meerut; the petitioners are not wanted in any criminal case; the police personnels of Police Station Puramufti and Dhoomanganj illegally detained the petitioners without any authority; the police illegally detained the petitioners since 1.3.2023 and till 3.3.2023 (i.e till the date of filing of the petition) the police did not produce the petitioners before any Magistrate; the family members are searching the petitioners from one police station to another but no one is telling anything about the petitioners; on 2.3.2023 in all the newspapers news was published regarding arrest of the petitioners by the police and the police officers admitted that they have arrested the petitioners on 1.3.2023 and since then the petitioners are in their custody and the police officers also giving statement that they are interrogating the petitioners regarding the incident that had taken place on 24.2.2023 regarding which a first information report was registered on 25.2.2023 being Case Crime No. 114 of 2023, under Sections 147, 148, 149, 302, 307, 506, 34, 120B IPC, Section 3 of Explosive Act and Section 7 of Criminal Law Amendment Act, Police Station Dhoomanganj, District Prayagraj; the petitioners have no concern with the aforesaid FIR; the petitioners are not named in the aforesaid FIR, however, husband of the petitioner no. 1 and brother of the petitioner no. 2

have been made accused and the allegations levelled against the father of the petitioner is of criminal conspiracy; the intention of the police is not fair and any mishappening may be occurred at any point of time with the petitioners.

6. On the basis of supplementary affidavit it is submitted that on 2.3.2023 Mansoor Ahmad (father of the petitioner no. 1) filed an application before Chief Judicial Magistrate, Allahabad under Section 97 & 98 Cr.P.C. upon which report was sought from police station Dhoomanganj and on 3.3.2023 Head Moharrir, Police Station Dhoomanganj submitted his report mentioning therein that Smt. Zainab Fatima, Smt. Aaisha Noori and Km. Unzila Noori are not in the police station. Being not satisfied and upon the objection of the counsel of Smt. Zainab Fatima and others the learned CJM Allahabad again directed the Station House Officer, Dhoomanganj to submit parawise reply and thereafter on 4.3.2023 the Station House Officer, Dhoomanganj submitted his report mentioning therein that Smt. Zainab Fatima, Smt. Aisha Noori and Km. Unzila Noori have been challaned by the police of police station Puramufti under Section 151 Cr.P.C. and they have been released on personal bonds on 3.3.2023.

7. The admitted position thus, is that the corpus are not under physical detention as on date.

8. A preliminary objection has been raised by Sri Manish Goyal learned Additional Advocate General appearing for the State-respondents that the petitioners are admittedly not in detention/custody, therefore, present petition is no longer maintainable and/or has become infructuous. It is submitted that admittedly the provision of Section 151 Cr.P.C. was invoked and petitioners have been released on personal bonds on their own undertaking and no restrain has been put on them.

9. Learned counsel for the respondents has placed reliance on judgments in the cases of **Rachna and another vs. State of U.P. and others AIR 2021 (Allahabad) 109 (FB), Markendey and others vs. State and another 1976 (74) ALJ 88, Bal Mukund Jaiswal vs. Superintendent, District Jail, Varanasi and another 1998 A.L.J. 1428, Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others (1980) 2 SCC 559, Chandra Dev Ram Yadav vs. State of U.P. and another 2014 (1) ALJ 210** and **Udaybhan Shuki vs. State of U.P. and others 1998 A.L.J. 2362**.

10. Replying to the preliminary objection, Sri D.S. Mishra, learned Senior Counsel for the petitioners submitted that even though the petitioners are not in physical custody but since they have been released on personal bonds, therefore, they are not at liberty to move freely, hence their personal liberty is still curtailed due to conditions imposed in the personal bonds. Submission, therefore, is that the present habeas corpus is still maintainable and has not become infructuous.

11. Learned counsel for the petitioners has placed reliance on judgments in the cases of **Sandal Singh vs. District Magistrate and Superintendent, Dehradun AIR 1934 Allahabad 148, Zahir Ahmad vs. Ganga Prasad, A.S.D.M., Ballia and another AIR 1963 Allahabad 4, Ram Manohar Lohia and others vs. State of U.P. and others AIR 1968 Allahabad 100, Nirmal Jeet Kaur vs. State of Madhya Pradesh and another (2004) 7 SCC 558, Sunita Devi vs. State of Bihar and another (2005) 81 SCC 608, Udaybhan Shuki vs. State of U.P. and others 1998 A.L.J. 2362, In the matter of Madhu Limaye 1969 (1) SCC 292, Bhim Singh, MLA vs. State of J & K and others AIR 1986 SC 494, Sunil Batra vs. Delhi Aministration**

(1980) 3 SCC 488 and **In the matter of Keshav Singh 1965 AIR (All) 148**.

12. Sri D.S. Mishra, learned Senior Counsel appearing for the petitioners draws strength to his arguments mainly from **Zahir Ahmad (supra)** and **Udaybhan Shuki (supra)**. Relevant paragraphs 4, 7 and 19 of **Zahir Ahmad (supra)** are quoted as under:-

> "4. A preliminary objection has been 'taken on behalf of the State by Sri Tripathi, the learned Additional Government Advocate, that the petitioner having been bailed out and being out of jail 'custody, cannot maintain the present petition, it has been submitted on behalf of the State that before a writ for habeas corpus can issue, the person sought to be set at liberty must be in actual physical custody and inasmuch as bail has been granted to the petitioner and he has availed of the same, he is neither in custody nor his movements are restrained, with the result that no writ of habeas corpus can be issued. It is common ground that the petitioner has been bailed out and is in the custody of the bondsmen, if the expression, 'custody' can be used in respect of a 'bailee' and that he is no longer in jail custody. It cannot be denied that the question under consideration is a difficult one and not free from controversy. Even if the case were to be decided on first principles, we would have been inclined to hold that the fact that a person has been granted bail does not amount to his being set at liberty. It is true that after bail is granted, he is no longer in physical custody in the sense of being in a prison but it is difficult to say that he has liberty of action or even complete liberty of movement. In the surety bonds, the sureties definitely state that they will produce him on a date appointed by the Court. The failure to produce him on the appointed date entails not only the forfeiture of the surety bonds but also the consequence of the cancellation of "the bail and the person being lodged in jail. The movements of the person let out on bail are subject to the directions of the Court and the Court has always the power to cancel the bail at any time. Under these circumstances, we find it difficult either to believe or to hold that the mere fact of bail being granted leads to the result that the petitioner has been set at liberty and that the case is no longer amenable to the writ of habeas corpus. In Words and Phrases, Volume 19, at page, 6 the law on the point has been stated in the following words:
>
> "The writ of 'habeas corpus' is the remedy which the law gives for the enforcement of the civil right of personal liberty..... The writ of habeas corpus is a writ of liberty, and its original purpose was for the release of persons illegally or forcibly imprisoned, but when it was made to appear that such detention was by virtue of the process of a Court, the writ was not granted, unless the proceeding or judgment supporting the process was absolutely void..... One under arrest, but at large on bail, is entitled to a writ of "habeas corpus" the same as if the arrest was accompanied by actual

imprisonment; the purpose of the writ being to test the right of the Court or other body issuing the process to detain the person for any purpose by restraining him of his right to go without question."

This statement of law is based upon Mackenzie v Barrett, 141 F. 964 at p. 966. The report of the case has, however, not been produced before us.

7. It would appear from the statement of law as contained in Extraordinary Legal Remedies by Ferris that actual physical custody is not necessary and even if the person is subject to the orders of another to surrender at the time when he wants him to surrender, a writ of habeas corpus would lie.

19. We have already examined the various provisions occurring in the Code of Criminal Procedure relating to bail and release on bail and it is clear from them that whereas a person released on bail is not in physical confinement, he still remains under the control of the Court and notionally in the custody of the Court, and that persons, who are his sureties, are only the agents of the Court. For these reasons it appears to us that even a person who has been temporarily let out on bail but still on trial, can present an application for a writ of habeas corpus. We, therefore, overrule the preliminary objection made by the learned Additional Government Advocate."

(emphasis supplied)

13. For ready reference, paragraphs 8 to 12 of **Udhaybhan Shuki (supra)** are quoted as under:-

8. We shall take up the prayers one by one and in that light refer to the facts relevant in relation to such prayers. The first prayer made before us relates to a writ of habeas corpus for production of the petitioner before the Court and for his immediate release and for his being set at liberty forthwith. Undisputedly, the applicant was released on bail and is being physically released from custody does not arise. The learned counsel for the petitioner, however, submits that his custody still continued as he was released on bail and is not at liberty to move freely. In this connection the learned counsel for the petitioner relied on the decision of the Allahabad High Court in the case of *Zahir Ahmad v. Ganga Prasad, A.S.D.M. Ballia AIR 1963 All 4*, it was observed by a Division Bench of this High Court that the fact that a person had been granted bail did not amount to his being set at liberty. It was true that after bail was granted, he was no longer in physical custody in the sense of being in a prison but it was difficult to say that he had liberty of action or even complete liberty of movement as he continued to remain under the control of the Court and notionally in the custody of the Court. The Court held on this reasoning that even a person who had been temporarily let out on bail but was still on trial would present an application for a writ of habeas corpus under Article 226 of the Constitution.

9. Zahir Ahmad in that case had made the application for a writ of habeas corpus to set him at liberty under certain backgrounds. A report was made to the S.D.M. by an S.I. of Police for action under Section 107 Cr.P.C. against Zahir Ahmad. The case was transferred to the Additional S.D.M. No order in writing was made by the Additional S.D.M. setting forth the substance of the

information received, the amount of the bond to be executed, the term for which it was to be in force and the number, character and class of sureties required as provided under the law. He had simply issued notices along with warrants of arrest and as such is was argued that the order was not one under Section 112 Cr.P.C. and upon a preliminary objection the Division Bench had opined that although he was on bail the habeas corpus petition would lie at the instance of Zahir Ahmad.

10. On the facts of the case, however, the Division Bench was satisfied that in substance the provisions of Section 112 Cr.P.C. had been complied with and consequently it was of the view that under the circumstances operating in the case it was not possible to hold that the petitioner was being illegally detained. It was thus a case where the very detention was challenged due to some illegality in the initial order although the petitioner was released on bail. In the case at our hands the detention is said to be illegal for non compliance of certain provisions of the constitution and certain directions of the Cr.P.C. It is stated that the petitioner was not told the reasons of his arrest as required under Section 50 of the Cr.P.C. and was produced before the Court and the Court had no authority to remand him or even release him on bail rather the Court should have release him forthwith because of his unlawful arrest.

11. The aforesaid contention of the learned counsel for the petitioner is not acceptable to us. Even conceding that the applicant was not told the reasons of his arrest as required under Section 50(1) of the Cr.P.C., his production before the Court was made with an allegation of his involvement in a substantive case. Once the applicant was produced in Court the provisions of Section 167 Cr.P.C. would apply. This section states that whenever any person is arrested and detained in custody and the investigation cannot be completed within a period of 24 hours, he is to be produced before the nearest judicial Magistrate with the relevant entries in the diary. After his arrest the applicant was produced before a Magistrate. Section 167(2) Cr.P.C. requires than when such a person has been produced before a Magistrate he may authorise the detention of the accused in such custody as such Magistrate may think fit. Under Secion 437 Cr.P.C. the Magistrate was also empowered to grant him bail instead of sending him to custody. An order of the Magistrate either directing remand of the accused in custody or directing his release on bail may not be affected by any initial defect in the making of arrest. Thus the present custody of the petitioner, as being on bail under orders of the Court, may not be treated to be a wrongful detention and although suitable action may lie against the concerned police officer for non-compliance of Section 50(1) Cr.P.C., there may not be an order directing the petitioner to be set at liberty the effect of which would be to discharge him from his bail bonds. In this connection a Full Bench decision of this High Court in the case of Bal Mukund Jaiswal v. Superintendent, District Jail, Varanasi as per Habeas Corpus Writ Petn. No. 9061 of 1994 reported in 1998 All LJ 1428 is relevant. This order was passed by the Full Bench when the matter was referred to it for answering a particular question. The Full Bench answered the question as follows (at p. 1430 of All LJ) :-

> "Where an accused person is in judicial custody on the basis of a valid remand order passed under Section 209 or 309 Code of Criminal Procedure by the Magistrate or by any other competent Court then such accused person cannot be set at liberty by issuing a writ of habeas corpus solely on the ground that his initial detention was violative of a constitutional guarantee enshrined in Articles 21 and 22 of the Constitution of India."

12. In view of the aforesaid reasonings given by us and in view of the Full Bench decision, we are unable to hold that the petitioner's first prayer is tenable simply on the ground of alleged wrongful arrest.”

(emphasis supplied)

14. Before proceeding further it would be relevant to take note of the provision of Article 21 of the Constitution of India, which is quoted as under:-

> "**21. Protection of life and personal liberty**.- No person shall be deprived of his life or personal liberty **except according to procedure established by law**."

(emphasis supplied)

15. Article 21 clearly provides that no person shall be deprived of his life or personal liberty except “according to procedure established by law”.

16. It is also relevant to take note of meaning of ‘habeas corpus’ as provided under Law of Writs by V.G. Ramachandran Seventh Edition at page 5, which is quoted as under:-

> “**Habeas Corpus Meaning**
>
> “Habeas corpus” is a Latin term. It means “have the body”, “have his body” or “bring the body”. By the writ of habeas corpus, the court directs the person (or authority) who has arrested, detained or imprisoned another to produce the latter before it (court) in order to let the court know on what ground he has been arrested, detained, imprisoned or confined and to set him free if there is no legal justification for the arrest, detention, imprisonment or confinement.
>
> According to the dictionary meaning, “habeas corpus” means “have the body”, “bring the body-person-before us”. Habeas corpus is a writ requiring a

person to be brought before a judge or a court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

It is a writ to a jailer to produce a prisoner in person, and to state the reasons of detention.

Habeas corpus is a writ requiring a person to be brought before a judge or court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

Habeas corpus is a writ requiring a person under arrest to be brought before a judge or into court to secure the person's release unless lawful grounds are shown for his or her detention."

17. In the same book at Sl. No. 15 at page 21 it has been provided that 'when habeas corpus does not lie' and at Sl. No. 3 it had been clearly provided that where the prisoner or detenu has been released and habeas corpus has become infructuous.

"Ref: Talib Hussain vs. State of J & K, (1971) 3 SCC 118; Bhim Singh v. State of J&K, 1984 Supp SCC 504; Ram Jethmalani v. Union of India, (1984) 3 SCC 571; Manilal Chatterjee v. State of W.B., (1972) 3 SCC 836 (1); Competent Authority v. Amritlal Chandmal Jain, (1998) 5 SCC 615; Karimaben K. Bagad v. State of Gujarat, (1998) 6 SCC 264."

18. The scope of habeas corpus has been recently decided in the case of **Home Secretary (Prison) and others vs. H. Nilofer Nisha (2020) 14 SCC 161**. Paragraphs 12, 16, 20, 21, 22 and 23 whereof are quoted as under:-

12. Article 226 of the Constitution of India empowers the High Courts to issue certain writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any right conferred under Part III of the Constitution dealing with the fundamental rights. In this case, we are concerned with the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus.

16. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is 'to produce the body', over a period of time production of the body is more often than not insisted upon but

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

20. Having held that a writ of habeas corpus is maintainable by a person who is under detention if his rights are violated, the question that remains to be answered is whether in the present case any right of the detenus was violated which could have led to the issuance of an order directing his release from prison. We may make reference to the judgment of this Court in B. Ramachandra Rao v. State of Orissa (1972(3 SCC 256, wherein it was urged before this Court that the orders of the Court directing the detention of the petitioner were illegal. In this case, the Court has held as follows:

> "5….This Court does not, as a general rule, go into such controversies in proceedings for a writ of habeas corpus. Such a writ is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal and we are not satisfied that the present is not such a case."

21. In Kanu Sanyal v. District Magistrate, Darjeeling (1973) 2 SCC 674 this Court while dealing with the writ of habeas corpus has held as follows:

> "4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty...."

22. In Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314, an order of remand was challenged before this Court. After referring to a large number of judgments9, which we are not referring in detail since they have all been considered in this judgment, this Court held as follows:

> "31….It is wellaccepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal…."

23. In Saurabah Kumar v. Jailor, Koneila Jail (2014) 13 SCC 436, this Court came to the conclusion that the petitioner was in judicial custody by virtue of an order passed by the judicial magistrate and, hence, could not be said to be in illegal detention. Justice T.S. Thakur, as he then was, in his concurring judgment held as follows:

> "22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced…"
>
> (emphasis supplied)

19. For ready reference, paragraphs 5, 9, 10, 11 and 12 of **Markendey (supra)** are quoted as under:-

> 5. Briefly speaking, the allegation regarding malafide is that the petitioners were arrested by the executive authorities under the directions of some political party, which did not favour the petitioners and other students of their group. To us-it appears that this ground cannot now be taken, simply because the present position is that all these six petitioners have been granted bail and, therefore, they are in the custody of the Magistrate who granted bail. We have looked into the judicial record of Crime No. 63 and have found that bail has been granted to all the six petitioners. There being no allegation of malafide against the Magistrate, who granted bail, the allegation of malafide against the Police or the executive authorities has now, therefore, become irrelevant.
>
> 9. ….
>
> The question whether a person who has been released on bail can present a petition for a writ of habeas corpus was specifically raised in Zahir Ahmad v. Ganga Prasad, and it was held that such a person remains under the control of the court and notionally in the custody of the court and he can, therefore, present a petition for a writ of habeas corpus. In the case of Babu Lal v. The State of Maharashtra, it has been laid down that a writ of habeas corpus can be presented by a person who has been released on bail.
>
> 10. We have examined the principle, which has been laid down in the aforesaid rulings. It is true that a person, who is on bail, can also present a petition, of habeas corpus, but the question still remains what relief can be granted to such a petitioner. In the case of Ram Manohar Lohia and so also in the case of Babu Lal it appears that the petitioner has challenged the legality of the provision of law under which the case was pending against him. It has been noted above that in the instant petition the legality of the provision of law has not been challenged and it has also not been said that there is no case under Sec. 188 of the Penal Code, 1860 pending against petitioners. Now the reliefs which have been claimed by the petitioners in the instant case are: (i) that the petitioners be released from jail and (ii) that the opposite parties should be restrained from enjoyment of the fundamental rights by the petitioners. Further, the petitioners have prayed that the detention should be declared illegal and invalid. So far as the first relief is already out of jail. The question of the validity of their detention has already been answered above, in the sense, that at present the petitioners are only under the notional custody

of the Magistrate who has granted them bail. This notional custody could be challenged by the petitioners only on two grounds, which have already been indicated above. The question whether the detention of the petitioners prior to the granting of bail was valid or not is not relevant now. The prayer that the opposite parties should be restrained from the enjoyment of fundamental rights by the petitioners is quite vague and the Court cannot pass any such order. Thus, in brief, it is evident that the Court is unable to grant any relief whatsoever to the petitioners in the instant petition.

11. If a person who is alleged to have committed a, bailable offence is produced before a Magistrate, as provided by Sec. 436(1) of the Code of Criminal Procedure, the person so arrested shall be released on bail, if at any stage of the proceedings before the court he is prepared to give bail. This provision of law also empowers the court to release the person on executing a bond, even without sureties. Similarly Sec. 437 of the Code makes a provision for persons who have been arrested in a non-bailable offence and have been produced before a Magistrate. Thus the policy of the law is that wherever a person is arrested their for a bailable offence or for a non-bailable offence, he shall remain either in actual physical custody to which he may be remanded under the various relevant provisions of the Code, namely, Secs. 167, 209 or 309 of the Code of Criminal Procedure, or he may be released on bail on personal bond with or without sureties, which would mean that the person shall remain in the notional custody of the court. No third course is open to the Magistrate. Thus the position is that once a person has been validly arrested in connection with an offence, he has either to remain in physical custody, and if that physical custody comes to an end, he will have to remain in notional custody so long as the proceedings are pending. Accordingly if at any stage it is found that there was some defect in the order or orders remanding the arrested person to physical custody, the order placing him in the notional custody of the court will not be necessarily vitiated. The physical restraint which once originated validly can come to an end only by placing him under the national custody of the court. If the physical custody becomes vitiated for some reason or the other, the court can order release, of the arrested person while issuing a writ of habeas corpus. But the court cannot order the release of the person from physical custody unconditionally, and it can only direct that the person be placed in notional custody of the court by admitting him to bail. In the instant case, the petitioners are in notional custody, and unless they could succeed in showing that this notional custody is illegal for some reason or the other, an order in their favour can be passed in these proceedings, even though there might the some defects in the order or orders remanding the petitioners to physical custody prior to the granting of bail to them.

12. The petition has been filed against the State of U.P. and the Superintendent of Central Jail, Naini. Because the petitioners are not confined

> in the Jail at all, it is evident that no relief can be granted against the Superintendent, Central Jail, Naini. It cannot also be said that the petitioners are in the custody of he State of U.P. In fact the petitioners are in the notional custody of the Magistrate who has granted bail to them, and no relief has been claimed against the Magistrate. If the petitioners are not in the custody of any of the opposite parties, the Court is unable to grant any relief. The object of a Writ of habeas corpus is not to punish previous illegality but to release a man from present illegal detention, and the writ must be directed to the person who is having the actual custody of the detenu.
>
> (emphasis supplied)

20. Admittedly, the petitioners have already invoked provisions of Section 151 Cr.P.C. and have been released on personal bonds. The petitioners are, therefore, not in detention much less the illegal detention.

21. In the present case no defect in the procedure adopted for releasing the petitioners on personal bond has ever been alleged.

22. From the entire petition it is not clear against whom, after having been released on personal bonds, the directions are being sought for protection of the corpus. It is, therefore, clear that the main plank of argument of learned counsel for the petitioners is that even after release their liberty is curtailed in case certain conditions are imposed for production of the corpus at the command of the court or the authority.

23. In this regard judgment of **Zahir Ahmad (supra)** is being relied on that under such facts and circumstances of the case after having been released on bail it was asserted that the personal liberty of the petitioner is still curtailed due to conditions imposed while releasing the detenu on bail, which was upheld by the Division Bench of this Court.

24. We may note that in the present case the petitioners have not been released on regular bail by the Court and have not been put into custody of the sureties and they have been released on

their own undertaking in the shape of personal bonds under Section 151 Cr.P.C. that they shall remain present whenever called for.

25. Thus, to say that the corpus is in their own custody due to personal understandings given by them only, would be a far fetched argument to sustain. In plain words, the said argument is not sustainable. Here, in the present case, the petitioners are not controlled by any body or any authority or by any other person against whom a direction can be issued to produce him or her. Moreover, to maintain their own life and liberty under Article 21 of the Constitution of India they have come forward to submit that the act (of release on personal bond) may be done with "procedure established by law". Therefore, it cannot be said that the custody of the petitioners is in illegal detention of themselves as admittedly, it is on their own undertaking / personal bonds they have been released under Section 151 Cr.P.C., which is a "procedure established by law".

26. **Zahir Ahmad (supra)** has been clearly distinguished by this Court in **Markendey (supra)** noticing the same in paragraphs 9 and 10 it was categorically held that the prayer that the opposite party should be restrained from the enjoyment of Fundamental Rights by the petitioners is vague and that the Court cannot pass any such order. In paragraph 11 question of notional custody of the Magistrate, who has granted them bail, was also considered and rejected. In paragraph 12 it was specifically mentioned that if the petitioners are in the custody of any of the opposite parties, the court is unable to grant any relief as the object of the habeas corpus is not to punish previous illegality but to release a man from present illegal detention and the writ must be directed to the person, who is in the actual custody of the detenue.

27. Subsequently, in the year 1998 also the case of **Zahir Ahmad (supra)** was considered by this Court in the case of **Udaybhan Shuki (supra)** and was clearly distinguished.

28. In aforesaid cases as held in **Zahir Ahmad (supra)** that even after release of the petitioner on bail he is not at liberty to move freely and therefore, he is in notional custody and hence habeas corpus petition would be maintainable was clearly noticed. However, in **Udaybhan Shuki (supra)** in paragraph 11 this Hon'ble Court clearly held that the contention of learned counsel for the petitioner is not acceptable to us and it was held that the custody of the petitioner as being on bail under orders of the Court, may not be treated to be a wrongful detention and may not be an order directing the petitioner to be set at liberty the effect of which would be to discharge him from his bail bonds.

29. The law laid down in **Bal Mukund Jaiswal (supra)** was also noted and the prayer of the petitioner that a writ of habeas corpus for production of the petitioner before the court after having been released on bail was specifically rejected. It is, therefore, clear that the law laid down in **Zahir Ahmad (supra)** is consistently being distinguished and in effect, is not finding favour in subsequent judgments of this Court.

30. We are also of the same view and opine that in case a person released on bail is permitted to challenge the imposition of the conditions or terms on which bail is granted, in a habeas corpus petition, on the ground that the petitioner, although physically released is, however, in notional custody of the authority or the court and therefore writ of habeas corpus can be issued, would amount to nullifying the conditions or terms of the bail so imposed and thus, would amount to releasing the person unconditionally, which is contrary to the "procedure established by law" under

Article 21 of the Constitution of India wherein, the life or personal liberty of a person can be subjected to procedure established by law. The law of grant of bail is a procedure established by law where a particular person is set at liberty from the physical custody.

31. We may also take note that the present case is even worse where the petitioners were released on their own personal bonds and are not even in notional custody of any third person or authority against whom writ of habeas corpus (to produce the corpus or set him at liberty) can be issued.

32. In our opinion the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked to nullify the effect of statutory provisions and / or the procedure established by law. A reference may be made in this regard to the judgment of the Hon'ble Apex Court in the case of ***Sapmawia vs. Deputy Commissioner, Aijal, 1970 (2) SCC 399***. Relevant extract of paragraph 11 of the said judgment is quoted as under:-

> *"11. .....The order of release in the case of a person suspected of or charged with the commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law. ....."*
>
> *(Emphasis supplied)*

33. We have also carefully gone through the other judgments cited by learned counsel for the parties and we find that the same are not exactly on the issue in hand. Hence, for the sake of brevity we are not inclined to deal with them separately.

34. At the cost of repetition it may be noted again that in **Markendey (supra)** in support of the argument that a writ of habeas corpus is maintainable was specifically raised in the light of judgment of **Zahir Ahmad (supra)** and was specifically considered and rejected. It was held that the court cannot order release of the person from physical custody unconditionally and it can only direct that the person be placed in notional custody of the court by admitting him to bail. While dealing with the question it was specifically held that the prayer that the opposite party should be restrained from the enjoyment of Fundamental Rights by the petitioners is quite vague and the court cannot pass such orders. After considering the scheme of Cr.P.C., specifically Sections 151, 209 and 309 it was further observed that the court cannot order to release a person from physical custody unconditionally by admitting him to bail and it can only direct that the person be placed in notional custody of the court by admitting him to bail. It was further held that if the petitioners are not in the custody under any of the opposite parties, the court is unable to grant any relief. The object of a writ of habeas corpus is not to punish previous illegality but to release a person from illegal detention. The aforesaid observation was considered by two Division Benches of this Court in the case of **Markendey (supra)** and **Udaybhan Shuki (supra),** which clearly reflects that a writ of the habeas corpus cannot be issued in favour of a person released on bail or on personal bond.

35. As per the Black's Law Dictionary 8th Edition, 'Personal Bond' is a written document under which the obligator formally recognizes an obligation to do specific act; personal bond is a bond containing promise without security. This clearly reflects that in a case of personal bond no other person except the very individual, who is coming forward is involved. Thus, a person, who himself is

making a promise to do certain act, as in the present case, to cooperate in judicial proceedings whenever required, is not even in notional custody of some/any other person.

36. Under such circumstances, it can be safely held that writ of habeas corpus would not be maintainable at the instance of a person, who has got himself released as per the procedure established by law i.e. Section 151 Cr.P.C. on his own promise, to claim that he shall be made free from his own promise made in the personal bond by issuing a writ of habeas corpus. In case, any such habeas corpus is held to be maintainable, this will give a handle to the persons, specifically, violators of law to wriggle out from their own promise and even in a case of bail or remand to get themselves free from any condition/term as may be imposed on them while releasing them from physical custody and would thus, render the entire administration of criminal justice ineffective and redundant.

37. In view of the discussions made hereinabove, we hold that the present petition after release of the petitioners on personal bonds has become infructuous. The claim of the petitioners that they are still in notional custody with their liberty curtailed and writ petition is still maintainable, is rejected. No such relief, i.e. release from custody, as claimed during course of argument by claiming that the petition is still maintainable, can be granted to the petitioners.

38. Present petition is accordingly **dismissed.**

Order Date :- 12.4.2023
Lalit Shukla/Nitendra