

**Court No. - 45**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 221 of 2023

**Petitioner :-** Ahzam Ahmad (Minor) And Another

**Respondent :-** State Of U.P. And 5 Others

**Counsel for Petitioner :-** Abhishek Kumar Mishra, Khan Saulat Hanif, Ravindra Sharma, Shadab Ali, Sr. Advocate, 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 assisted by S/Sri Ravindra Sharma, Shadab Ali and Abhishek Kumar Mishra, learned counsel for the petitioners and Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned A.G.A. appearing for the State respondents.

**2.** Present petition has been filed with the following prayers:-

“(i) Issue a writ, order or direction in the nature of writ of Habeas Corpus commanding and directing the respondents to produce the corpus before this Hon'ble Court and set them at liberty forthwith.

(ii) Issue a writ, order or direction in the nature of writ of Habeas Corpus commanding and directing the respondents may also be directed to satisfy this Hon'ble Court for the illegal detention of the petitioners.”

**3.** The petition has been filed by minor sons (corpus) of Ateek Ahmad, Ex. MP under the guardianship of their natural guardian and real mother Shaishta Parveen. It is claimed that the petitioner no. 1-Ahzam Ahmad and the petitioner no. 2-Aaban Ahmad are student of Class-XII and Class-IX respectively and at present both the petitioners are minor. It has been disclosed in the petition that

father of the petitioners, namely, Ateek Ahmad is in jail since 2017 and real uncle of the petitioners, namely, Khalid Azeem @ Ashraf is also in district jail Bareilly since 2020. The minor sons (corpus) are living with their mother. It is alleged that on 24.2.2023 at about 06:00 P.M. police of Police Station Khuldabad, Dhoomanganj and Puramufti came to the house of the petitioners without lady police and forcibly and illegally entered in the house of the petitioners by breaking the doors arrested the petitioners without showing any summon, warrant or any other document and police personnels also misbehaved with the petitioners as well as with their mother. The allegation is that the police personnels of Police Station Dhoomanganj, Puramufti and Khuldabad forcibly arrested the petitioners and have taken them in their illegal custody without disclosing any reason for their arrest and that the petitioners are innocent and are not wanted in any criminal case. The allegation is that the police authorities have illegally detained the petitioners without any authority since 24.2.2023. It is also alleged that the petitioners are in detention till today i.e. 3.3.2023 (till the date of filing of the present petition). It is alleged that the petitioners are being kept in some undisclosed location by the police and are being mentally and physically tortured without any authority of law or any other reason and thus, the petitioners are being deprived of their personal life and liberty provided under Article 21 of the Constitution of India, which clearly provides that the same cannot be affected except in accordance with the procedure established by law.

**4.** Fact regarding lodging of the first information report dated 25.2.2023 being Case Crime No. 0114 of 2023, under Sections 147, 148, 149, 302, 307, 506, 34 and 120-B IPC, Section 3 of Explosive Act and Section 7 of Criminal Law Amendment Act, Police Station Dhoomanganj, District Prayagraj regarding incident

of murder of one Umesh Pal, who was eye witness in the murder case of Raju Pal, wherein father of the petitioners Ateek Ahmad and real uncle Khalid Azeem @ Ashraf are main accused has also been disclosed with a categorical statement that the petitioners are not accused in the aforesaid crime and copy of the first information report has been annexed as Annexure-1 to the petition.

**5.** A supplementary affidavit was filed on 23.3.2023 annexing therewith several documents. It has been stated that the police authorities have arrested the petitioners without any warrant in the night of 1.3.2023, however, we find that in paragraph 9 of the petition it has been stated that the petitioners were arrested on 24.2.2023 at 06:00 P.M. Annexure-1 to the supplementary affidavit is a copy of the application dated 27.2.2023 filed by the mother of the petitioners Shaishta Parveen before the Chief Judicial Magistrate, Allahabad regarding alleged illegal detention of the petitioners, namely, Ahzam Ahmad and Aaban Ahmad and prayed that a report be summoned from the Police Station Dhoomanganj in respect of the petitioners as to whether the petitioners are named in any crime so that necessary legal action may be taken. Annexure-2 to the supplementary affidavit is the report dated 2.3.2023 submitted by the Police Station Dhoomanganj that there is no GD entry in respect of the petitioners in the said police station and the alleged first information report being Case Crime No. 0114 of 2023 is being investigated by In-charge Inspector Dhoomanganj, who is out of the police station. Annexure-3 to the supplementary affidavit is a copy of the orders dated 28.2.2023, 3.3.2023 and report dated 4.3.2023 submitted by the In-charge Inspector Police Station Dhoomanganj to the effect that the applicant Shaishta Parveen is named in the first information report dated 25.2.2023 in a triple

murder case and her sons petitioner nos. 1 and 2 herein were found in Chakia Kasari Masari area and they have been sent to Child Protection Home on 2.3.2023. Annexure-4 to the supplementary affidavit is a copy of the application moved by Shaishta Parveen on 6.3.2023, wherein prayer was made that Police Station Dhoomanganj be directed to inform about the report from the Child Protection Home. A copy of the order-sheet of the court of Chief Judicial Magistrate, Allahabad from 28.2.2023 to 20.3.2023 has been annexed as Annexure-5 to the supplementary affidavit. A copy of the order dated 21.3.2023 passed by this Court in Criminal Misc Writ Petition No. 4003 of 2023 (Khalid Azeem @ Ashraf vs. State of U.P. and others) is also annexed, which to our mind, is not relevant for the purpose of considering present petition in hand as the same relates to the relief that were being claimed by the petitioner-Khalid Azeem @ Ashraf (real uncle of the petitioners) exclusively for himself only.

**6.** Perusal of Annexure-1 to the petition reflects that the mother of the petitioners, namely, Shaishta Parveen, who has filed present petition as natural guardian and real mother of the petitioners, is also one of the accused along with father and uncle of the petitioners named above. It is further reflected that contrary to the statement made in the petition at Sl. Nos. 6 and 7 sons of Ateeq Ahmad have also been arrayed as accused. Specifically, at Sl. No. 6 accused is "Ateek Ahmad ka Putra" (i.e. son of Ateek Ahmad) whereas at Sl. No. 7 accused specified are "Ateek Ahmad ke anya Putra". Therefore, clearly, even without giving specific names other sons of Ateek Ahmad have also been arrayed as accused in the above mentioned FIR.

**7.** During course of arguments it also transpired that Shaishta Parveen, mother of the petitioners, through whom this petition had been filed, is absconding and is also carrying award of Rs.

25,000/- on her head.

**8.** It is alleged in the petition that the police authorities have arrested the petitioners without any warrant and are being detained illegally without there being any order of competent court / Magistrate and there is a clear violation of Section 50 Cr.P.C. in the present case. Crux of submission of learned counsel for the petitioners is that the detention of the petitioners is clear violation of their constitutional as well as statutory rights.

**9.** A preliminary objection was raised by Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned A.G.A.-I that the present petition is not maintainable as the petitioners have already invoked provisions of Section 97 Cr.P.C. and have approached the competent court i.e. the court of Chief Judicial Magistrate, Allahabad and the corpus are in Child Protection Home. Submission, therefore, is that as the petitioners have already invoked the alternative effective statutory remedy, and moreso, when the stand taken by the police authorities that the petitioners are in Child Protection Home, therefore, on the ground of already invoked effective statutory remedy and also in view of Full Bench decision in the case of **Rachna and another vs. State of UP and others**, AIR 2021 ACR 109 (FB), the present Habeas Corpus petition is not maintainable.

**10.** Replying to the same, learned counsel for the petitioners Sri D.S. Mishra, learned Senior Counsel submitted that as there is a violation of Article 21 of the Constitution of India, therefore, existence of alternative remedy would not be a bar.

**11.** Learned counsel for the petitioners has placed reliance on judgments of **Smt. Icchu Devi Choralia vs. Union of India and others (1980) 4 SCC 531 (paragraph 4)**, **Ayya @ Ayub vs. State of U.P. and others (1989) 1 SCC 374 (paragraph 11)**,

**Bhim Sen Tyagi vs. State of U.P. through D.M. Mahamaya Nagar 1999 (2) JIC (All) (FB) (paragraph 21), Chairman Railway Board and others vs. Chandrima Das (Mrs) and others (2000) 2 SCC 465 (paragraphs 7 to 11), Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1 (paragraphs 14 to 20), In the matter of Madhu Limaye and others 1969 (1) SCC 292 (paragraphs 10 to 14), Sunil Batra (II) vs. Delhi Administration (1980) 3 SCC 488 (paragraphs 20, 21, 26, 27, 30, 31, 40, 42), Capt. Dushyant Somal vs. Smt. Sushma Somal and another (1981) 2 SCC 277 (paragraphs 5 and 7), Vinayak Goyal vs. Prem Prakash Goyal and others 1981 AWC 457 (paragraphs 8 to 11), Ram Manohar Lohia vs. Superintendent, Central Prison, Fatehgarh 1954 0 Supreme (All) 149, Munshi Singh Gautam (D) and others vs. State of M.P. 2004 0 (Supreme (SC) 1416, Prabhu Dayal Deorah etc. vs. District Magistrate, Kamrup and others 1973 0 Supreme(SC) 320 and Raman Lal Rathi vs. Commissioner of Police 1951 0 Supreme (Cal) 209.**

**12.** During course of argument, Sri D.S. Mishra, learned Senior Counsel submitted that the provisions of Section 97 Cr.P.C. would not be applicable in the present case.

**13.** On a pointed query by this Court that if this argument is to be raised, he must specify under which provision the mother of the petitioners Shaishta Parveen has moved an application before the Chief Judicial Magistrate, Allahabad, which is being pursued, wherein several orders have already been passed, if the said application has not been filed under Section 97 Cr.P.C.? We specifically note that no reply to the said question was given by the learned Senior Counsel.

**14.** In any case, we find that it is a settled law that mention of

incorrect provision or non-mentioning of the provision by itself does not render the proceedings invalid and therefore, preliminary objection that the petitioners have already approached the competent court under Section 97 Cr.P.C. by filing effective statutory remedy is upheld.

**15.** Before proceeding further it would be relevant to take note 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)

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

**17.** 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.

**18.** For ready reference, Section 97 Cr.P.C., which provides effective statutory remedy, is also quoted as under:-

“97. Search for persons wrongfully confined.- If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.”

**19.** We have carefully gone through the judgments cited by learned counsel for the petitioners and we find that none of the judgments so cited support the submission of learned counsel for the petitioners made in reply to the preliminary objection.

**20.** In **Smt. Ichhu Devi Choralia (supra)** order of detention passed under the provisions of Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was under challenge and also on the ground of violation of Article 22(5) of the Constitution of India. In paragraph 4 as relied on by learned counsel for the petitioners it has been laid down that the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Such questions are not involved in the present case, and aforesaid case also does not deal with preliminary objection as raised in the present case therefore, the case is not relevant for

the purpose of dealing with preliminary objection involved herein.

**21.** Reliance on paragraph 7 of the **Ayya @ Ayub (supra)** has been placed to assert that the personal liberty protected under Article 21 of the Constitution of India is sacrosanct and high in the scale of constitutional values. There is no quarrel about this proposition of law. However, it may be noted that in this case also the order of detention of the petitioner under Section 3(2) of the National Securities Act, 1980 was under challenge and therefore, this case is also not relevant for the purpose of disposal of issue of preliminary objection.

**22.** There can be no dispute that the question of interpretation of Article 21 of the Constitution of India and its applicability is not before this Court at this stage.

**23. Madhu Limaye (supra)** is also not on the issue of availability of alternative remedy and thus, does not address the preliminary objection raised by the State, where Madhu Limaye, Ex-MP and several other persons were arrested and question in relation to the compliance of Article 22(1) of the Constitution of India was raised. This case also does not provide any reply to the issue of preliminary objection.

**24.** In **Sunil Batra (supra)** right of a detenu in jail was under consideration, therefore, the same is also not relevant for the purpose of preliminary objection issue.

**25.** Similarly, in **Re Keshav Singh 1964 0 Supreme (SC) 238** the paragraph relied on by learned counsel for the petitioners are on the question of grant of bail in habeas corpus matter, which again is not relevant for replying the issue of preliminary objection.

**26.** The judgments of **Capt. Dushyant Somal (supra)** and **Vinayak Goyal (supra)** are on the child custody and they are also not relevant on preliminary objection.

**27. Munshi Singh Gautam (supra)** is also not relevant as it is on the custodial death and thus, is not relevant in the present case on preliminary objection.

**28.** In **Prabhu Dayal Deorah (supra)** the detention order under the Maintenance of Internal Security Act, 1971 was under challenge and therefore, this case also does not address the preliminary objection issue.

**29.** Similarly, in **Raman Lal Rathi (supra)** the detention order under the Preventive Detention Act, 1950 was under challenge and is also not relevant. In the said case also the question of Article 22(5) of the Constitution of India was involved, which is not so in the present case.

**30.** In **Ram Manohar Lohia (supra)** the petitioner was arrested and scope of habeas corpus petition was considered and challenge to the constitutionality of the Act was also raised, however, we find that the same also does not provide any specific reply to the preliminary objection.

**31.** We find that in **Whirlpool Corporation (supra)** the question of maintainability of the writ petition under Article 226 of the Constitution of India was considered and it was held that power to issue alternative writs under Article 226 of the Constitution of India is plenary in nature and is not limited by any other provision of Constitution and this power can be exercised by the High Court not only for issuing writs for the enforcement of any of the fundamental rights contained in Part-III of the Constitution but also for 'any other purpose'. It was held that under Article 226 of the Constitution of India, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition but the High Court imposed upon itself certain restrictions one of which is that if an alternative

effective remedy is available, the High Court would not normally exercise its jurisdiction but the alternative remedy has been consistently held by this Court not to operate as a bar. However, in three contingencies, namely, for enforcement of any fundamental rights or in violation of principles of natural justice or where the order proceedings are wholly without jurisdiction or the vires of an Act is under challenge it was held that alternative remedy would not operate as an absolute bar. The said judgment is being consistently relied on till now.

**32.** In **The Chairman, Railway Board (supra)** while the question of invoking jurisdiction under Article 226 of the Constitution on India was whether the same can be invoked to get relief otherwise available under the private law.

**33.** In **Bhim Sain Tyagi (supra)** the question of challenge to notice issued under U.P. Control of Goondas Act, 1970 was involved and in this case judgment of **Whirlpool Corporation (supra)** on alternative remedy was relied on, which has already been discussed above.

**34.** We find that there is no quarrel with the law regarding invoking the jurisdiction of High Court under Article 226 of the Constitution of India that availability of alternative remedy is not an absolute bar. However, equally settled is the law that Courts ought to be extremely slow in exercising its extraordinary jurisdiction if effective alternative statutory remedy is available. In the present case, we find that the petitioners have already invoked the provisions of Section 97 Cr.P.C., which is an effective statutory remedy, therefore, it is not the question where preliminary objection is being raised solely on the ground that effective statutory remedy is available. In fact, preliminary objection is that admittedly, the effective alternative statutory remedy has already

been availed of by the petitioners, which is still pending and is being pursued by the petitioners. Therefore, reply to the preliminary objection that effective statutory remedy has already been availed of, merely by asserting that the alternative remedy is not an absolute bar, in our opinion, is of no help to the petitioners as admittedly the same has already been availed of. On this admitted fact, the preliminary objection is liable to be sustained.

**35.** We further find that a clear stand taken by the State is that the petitioners have been lodged in Child Protection Home, therefore, prima facie, a genuine presumption can be raised that the machinery under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 has been put into motion. Therefore, present petition would not be maintainable in view of the judgment of Full Bench of this Court in the case of **Rachna** (supra). The questions referred to the Full Court and the answers thereto as given in para 79 of the said judgement are quoted as under:

**"79.** *We accordingly come on our conclusions in respect of question nos. 1, 2 and 3 for determination as follows:*

**Question No. 1:** *"(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?"*

**Answer:** *If the petitioner corpus is in custody as per judicial orders passed by a Judicial Magistrate or a Court of Competent Jurisdiction or a Child Welfare Committee under the J.J. Act. Consequently, such an*

*order passed by the Magistrate or by the Committee cannot be challenged/assailed or set aside in a writ of habeas corpus.*

**Question No. 2:** *"Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?"*

**Answer:** *An illegal or irregular exercise of jurisdiction by a Magistrate or by the Child Welfare Committee appointed under Section 27 of the J.J. Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home cannot be treated an illegal detention.*

**Question No. 3:** *Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015 the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes, is legally valid or it requires a modified approach in consonance with the object of the Act?"*

**Answer:** *Under the J.J. Act, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/Committee must give credence to her wishes. As per Section 37 of the J.J. Act the Committee, on being satisfied through the inquiry that*

*the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the orders mentioned in Section 37(1)(a) to (h)."*

**36.** Much emphasis was given by learned counsel for the petitioners while replying to the preliminary objection regarding violation of Article 21 of the Constitution of India.

**37.** At the cost of repetition it is reiterated that Article 21 clearly provides protection of life and personal liberty, however, it has clearly provided that no person shall be deprived of his life or personal liberty "except according to procedure established by law".

**38.** In the present case, the stand taken by the State while raising preliminary objection to the present petition was that the petitioners are in Child Protection Home, therefore, even if at this stage, it is not clear as to how the petitioners have reached Child Protection Home, one thing is clear that administration of criminal justice is operating, which is the procedure established by law (although with this stand of the State, Full Bench decision in **Rachna** (supra) would cover the issue involved, including preliminary objection). It is clearly reflected from the record that the petitioners have already invoked provisions of Section 97 Cr.P.C. before the competent court of law i.e. Chief Judicial Magistrate having jurisdiction over the matters. Thus, they have availed the effective statutory remedy and thus, have put the criminal administration of justice into motion and as per settled law writ of habeas corpus cannot be issued to set the same at

knot.

**39.** To sum up, it can be said that the petitioners have already invoked provisions of Section 97 Cr.P.C., hence administration of criminal justice has already come into play and the same cannot be set at knot by simultaneously invoking extra-ordinary remedy under Article 226 of the Constitution of India, which may be a remedy of right but as per settled law cannot be issued as a matter of course. Moreover, when corpus are in Child Protection Home, the present writ petition would not be maintainable as per the law settled by Full Bench decision in ***Rachna*** (supra).

**40.** Consequently, in view of the discussions made hereinabove preliminary objection raised by the State that the present petition is not maintainable as the petitioners have already invoked provisions of Section 97 Cr.P.C. and have approached the competent court is upheld.

**41.** Present petition, accordingly, stands dismissed as not maintainable.

**Order Date :-** 11.4.2023  
Lalit Shukla/Abhishek