

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.77 of 2021

Arising Out of PS. Case No.-133 Year-2019 Thana- KAMTAUL District- Darbhanga

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Anita Devi, Wife of Ganesh Sahni, Resident of Village-Bazidpur, P.S.-
Kamtoul, District- Darbhanga.

... .. Petitioner

Versus

1. The State of Bihar through Director Principal Secretary Home Department,
Govt. of Bihar, Patna.
2. The Director General of Police, Bihar, Patna.
3. That Additional Director General of Police, Bihar, Patna.
4. The Deputy Inspector General of Police Darbhanga range, Darbhanga.
5. The Senior Superintendent of Police, Darbhanga.
6. The Deputy Superintendent of Police, Darbhanga.
7. The Superintendent of Police, District- Madhubani.
8. The Superintendent of Child Home (Children), Madhubani.
9. The Investigation Officer cum Station House Officer, Kamtoul, Darbhanga.
10. SD, Wife of PY, Resident of Village-Bazidpur, P.S.- Kamtoul, District-
Darbhanga.

... .. Respondents

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Appearance :

For the Petitioner : Mr. Vinay Kumar Mishra, Advocate
For the Respondents : Mr. Prabhu Narayan Sharma, AC to AG

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 23-07-2021

In the present writ petition, the petitioner has
prayed for issuance of a writ in the nature of *habeas corpus* for



release of one PK and her son aged about five months.

2. The petitioner claims herself to be the mother-in-law of the aforesaid PK.

3. The mother of the aforesaid PK namely, SD submitted a written report on 06.09.2019 to the Officer-in-charge of Kamtoul Police Station, Darbhanga wherein she stated that when her minor daughter aged about 13 years, a student of class-VIII, had gone out of her house to attend the call of nature, her co-villagers, namely, Birendra Kumar Sahni, Govind Sahni, Ganesh Sahni and Wakil Sahni forcibly abducted her. They took her on a motorcycle to some unknown place. She raised apprehension that the aforesaid persons may push her daughter in immoral activity or kill her.

4. On the basis of the aforesaid written report, Kamtoul P.S. Case No.133 of 2019 dated 06.09.2019 was registered under Section 366-A read with 34 of the Indian Penal Code and Sections 4 and 8 of the Protection of Children from Sexual Offences Act against Birendra Kumar Sahni, Govind Sahni, Ganesh Sahni and Wakil Sahni and investigation was taken up.

5. Upon recovery of the victim, the investigating officer filed a petition for recording her statement



under Section 164 of the Code of Criminal Procedure (for short 'CrPC'). Pursuant to the application of the investigating officer, the statement of the victim was recorded on 12th August, 2020 by the jurisdictional Magistrate. Before the learned Magistrate, the victim disclosed her age to be 20 years. She stated that out of her own sweet will, she had left her house on 03.09.2019 and got married in a temple at Himachal Pradesh with Birendra Kumar Sahni. She stated that she wanted to live with her husband and her parents had instituted a false case.

6. It is submitted by Mr. Vinay Kumar Mishra, learned counsel for the petitioner that after recording the statement of the victim, the victim was sent for medical examination to Darbhanga Medical College and Hospital, Darbhanga. It is submitted that on receipt of the medical report, the learned Jurisdictional Magistrate sent the victim to the Balika Grih, Madhubani. It is contended that pursuant to the aforesaid judicial order passed by the learned Jurisdictional Magistrate, the victim is being kept with her five month old child in the Balika Grih at Madhubani. He contended that the continued placement of the victim and her child in the Balika Grih amounts to illegal detention.

7. Opposing the application filed on behalf of



the petitioner, Mr. Prabhu Narayan Sharma, learned counsel for the State submitted that the instant writ petition is not maintainable in view of the fact that the alleged victim and her child are placed in the Balika Grih pursuant to a judicial order passed by a Judicial Magistrate of competent jurisdiction. He contended that a judicial order passed by a competent court cannot be set aside or assailed in a writ in the nature of *habeas corpus*. He contended that even if the order is illegal, the validity and correctness of the order cannot be tested in writ jurisdiction. He contended that the aggrieved party may seek remedy against an illegal order by filing an appropriate petition before the competent revisional or appellate court under the statutory provisions of law. In support of his submission, he has placed reliance on the ratio laid down by this Court in **Shikha Kumari vs. The State of Bihar through Principal Secretary, Home (Police) Department and Ors. [2020 (1) PLJR 15]**.

8. We have heard learned counsel for the parties and carefully perused the record.

9. The Latin phrase '*habeas corpus*' means literally that "you", that is, the person with custody over the prisoner must "have the body" of the prisoner produced in the court at the place and time order by a Judge. The writ of *habas*



corpus provides individuals with protection against arbitrary and wrongful imprisonment.

10. The meaning of the term '*habeas corpus*' is "you must have the body". In Halsbury Laws of England, 4th Edition, Vol.11, p.1452, p.768, it is observed:

"The writ of habeas corpus ad subjiciendum" which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal."

11. *Habeas corpus ad subjiciendum* means "that you have the body to submit or answer."



12. May in his Constitutional History of England (1912), Vol.II, p.130, described writ of *habeas corpus* as "the first security of civil liberty". Blackstone called the writ of *habeas corpus* as "the great and efficacious writ in all manner of illegal confinement."

13. Julius Stone in Social Dimensions of Law and Justice, (1966), p.203 described the writ of *habeas corpus* as a picturesque writ with an extraordinary scope and flexibility of an application.

14. According to Dicey (A.V. Dicey), Introduction to the Study of Law of the Constitution, Macmillan and Co., Ltd., p.215(1915): "if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of *habeas corpus* to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free."

15. In **Greene vs. Home Secretary, (1941) 3 All ER 388**, it has been observed:

"Habeas corpus is a writ in the nature of an order calling upon the person who has detained another to produce the latter before



the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

16. The prerogative writ of *habeas corpus ad subjiciendum* is the most renowned contribution of English common law to the protection of human member.

17. In India, the jurisdiction to issue prerogative writs came with the establishment of the Supreme Court by regulating Act of 1773. The charter of 1774 gave power to each of the justices of the Supreme Court of Calcutta to issue a writ of *habeas corpus*. The three Supreme Courts in Calcutta, Bombay and Madras by the Act of Parliament in 1861 were abolished and High Courts were established and the power to issue writs of *habeas corpus* was inherited by them. This power to issue writ of *habeas corpus* was taken away from 1875 and new power of the High Court arose under Section 491 of the Code of Criminal Procedure, 1898 to issue statutory directions in the nature of *habeas corpus*. By Articles 32 and 226, the Supreme Court and all the High Court got jurisdiction to issue writ of *habeas corpus* throughout their respective territorial jurisdiction when the Constitution came into force.

18. Article 21 of the Constitution of India



provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

19. A writ of *habeas corpus* under Article 32 of the Constitution of India in the Supreme Court is available in case of violation of fundamental rights guaranteed under Article 21 but it does not relate to interference with the personal liberty by a private citizen. However, the High Court has jurisdiction to issue writ of *habeas corpus* under Article 226 of the Constitution of India not only for violation of fundamental rights of freedom but also for other purposes. The High Court can issue such writ against a private person also.

20. In **Col. Dr. B. Ramachandra Rao vs. The State of Orissa & Ors.**, [(1972) 3 SCC 256], the Supreme Court held that a writ petition cannot be issued 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.

21. Thus, it can be held that a writ of *habeas corpus* could not be issued, firstly, in cases where the detention or custody is authorized by an order of remand issued by a competent court of jurisdiction and secondly, where a person is committed to jail by a competent court by an order which does



not appear to be without jurisdiction.

22. In **State of Maharashtra & Others vs. Tasneem Rizwan Siddiquee**, [(2018) 9 SCC 745], the question before the Supreme Court was again as to whether a writ of *habeas corpus* could be maintained in respect of a person who is in police custody pursuant to remand order passed by a Jurisdictional Magistrate in connection with the offence under investigation. In that case, the Supreme Court answered the question as follows:

“The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436 : (2014) 5 SCC (Cri) 702] and Manubhai Ratilal Patel v. State of Gujarat [(2013) 1 SCC 314 : (2013) 1 SCC (Cri) 475] . It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3-2018/19-3-2018 and decided by the High Court on 21-3-2018 [Tasneem Rizwan Siddiquee v. State of Maharashtra, 2018 SCC OnLine



Bom 2712] her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.” (emphasis supplied)

23. In **Serious Fraud Investigation Office vs. Rahul Modi & Anr.**, [(2019) 5 SCC 266], the Supreme Court cancelled bail granted by the Delhi High Court to Rahul Modi and Mukesh Modi accused of duping investors of several hundred crores through a ponzi scheme run by their Gujarat based other co-operative societies. Both the accused were released by the Delhi High Court in a *habeas corpus* writ petition even though they were remanded to judicial custody



under the orders of a competent court. After elaborately dealing with the ratio laid down by the Supreme Court in earlier cases, the Supreme Court held as follows:

“The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the



*accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-6-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12-2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. **If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified***



in entertaining the petition and passing the order.”

(emphasis supplied)

24. A similar question arose before this Court in **Shikha Kumari (supra)**. The questions referred to the Full Bench in **Shikha Kumari** were as follows:

*“(1) Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside;
(2) Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus, holding such order of remand to be an illegal detention and;
(3) Whether an improper order could be termed/viewed as an illegal detention.”*

25. The Full Bench in **Shikha Kumari (supra)** held that in case of elopement if a minor girl is sent to Protection Home/Nari Niketan/After Care Home/Remand Home by a judicial order passed by a court of competent jurisdiction, the same cannot be treated to be an illegal confinement giving rise to a remedy under the writ of *habeas corpus*. The Full Bench has also expressly overruled the contrary view taken by the Division Bench of the Patna High Court in **Sahebi Khatoon @ Sahebi vs. State of Bihar & Ors. (Cr.WJC No.991 of**



2010).

26. After an elaborate discussions on the issues referred to the Full Bench, it answered the questions in paragraph 68 as under:

“We, accordingly, sum up our conclusions in respect of the first three issues for determination as follows:-

Question No.1: “Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside?”

Answer: Our irresistible conclusion in view of the ratio laid down by the Supreme Court in the aforementioned cases is that a writ of habeas corpus would not be maintainable, if the detention in custody is as per judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. Consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

Question No.2: “Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus, holding such order of remand to be an illegal detention?”

Answer: An illegal or irregular exercise of



jurisdiction by a Magistrate passing an order of remand can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate court under the statutory provisions of law. Such an order of remand passed by a Judicial Magistrate of competent jurisdiction cannot be reviewed in a petition seeking the writ of habeas corpus.

Question No.3: “Whether an improper order could be termed/viewed as an illegal detention?”

Answer: In view of the clear, unambiguous and consistent view of the Supreme Court in the afore-discussed cases, we unhesitatingly conclude and hold that an illegal order of judicial remand cannot be termed/viewed as an illegal detention.”

27. Admittedly, in the instant case, the so-called daughter-in-law of the petitioner has been sent to the Balika Grih, pursuant to a judicial order passed by a court of competent jurisdiction. For the reasons best known to the petitioner, the order by which the so-called daughter-in-law of the petitioner has been sent to the Balika Grih has not been brought on record.

28. Keeping in mind the discussions made



hereinabove, we are of the opinion that the instant writ petition is thoroughly misconceived. It is dismissed, accordingly.

(Ashwani Kumar Singh, J.)

(Arvind Srivastava, J.)

sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
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