

(1962) 01 AHC CK 0008

In the Allahabad High Court

Case No : Criminal Misc. Case No. 2788 of 1961

Zahir Ahmad

APPELLANT

Vs

Ganga Prasad, A.S.D.M., Ballia and Another

RESPONDENT

Date of Decision : 22-01-1962

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1898 (CrPC) — Section 112, 113, 114, 115, 367(4)

Citation : AIR 1963 All 4 : (1962) 32 AWR 543 : (1963) CriLJ 20

Hon'ble Judges : T. Ramabhadran, J; Jagdish Sahai, J

Bench : Division Bench

Advocate : M. Asif Ansari and Shanti Swarup Bhatnagar, for the Appellant;
H.C.P. Tripathi, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Jagdish Sahai, J.—The petitioner Zahir Ahmad has come to this Court under Article 226 of the Constitution of India and has prayed for the issue of a "Writ of habeas corpus or an order in the nature of habeas corpus to the respondents" to set the petitioner at liberty without any delay. The facts giving rise to this petition in short are as follows:

2. On the 7th of October, 1961, Sub-Inspector Permanand Dube, Station Officer police station Kotwali, Ballia made a report to the S. D. M., Ballia for taking proceedings u/s 107 of the Code of Criminal Procedure against the petitioner and eleven others. It appears that the case was transferred to the court of Sri Ganga Prasad, Additional S. D. M., Ballia for trial. It is the common case of the parties that Sri Ganga Prasad did not make an order in writing 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 for in Section 112, Cr.P.C. What he did was that he issued notices along with warrants of arrest on 16-10-1961 to the petitioner and others who were being proceeded against along with him. The notice purporting

to be u/s 112 of the Code of Criminal Procedure reads as follows:

"Notice u/s 107/112, Cr.P.C. Whereas I, Ganga Prasad, Magistrate, 1st Class, Ballia have received information from S. O. Kotwali, Ballia vide his report dated 7-10-61 that you Sri Zahir Ahmad, s/o Mukhtar Ahmad, village Amdari police station Kotwali Ballia are likely to commit breach of peace on account of bad relation with Sri Ram Badai Bhar and others in connection with dispute over litigation which is within the local limits of my jurisdiction and whereas I am satisfied from the said report that there does exist an apprehension of the breach of peace from you people named above.

I, therefore, call upon each of you to show cause as to why you should not be ordered to execute a personal bond of Rs. 500/- with two reliable sureties each in the like amount to keep peace for a period of one year.

Dated : Sd/- Ganga Prasad, 16-10-61. Magistrate, 1st Class, Ballia. Notice read over and explained to the O. P. in Hindustani.

Sd. Ganga Prasad, Magistrate, 1st Class, Ballia."

3. The contention of Mr. Asif Ansari, the learned counsel for the petitioner before us is, firstly, that the entire proceedings are void and without jurisdiction inasmuch as the learned Magistrate, Sri Ganga Prasad, did not pass an order u/s 112 of the Code of Criminal Procedure and secondly, that, in any case, no warrant of arrest could have been issued in the present case and the proceedings u/s 107 or at any rate, the proceedings after the issue of the warrant are illegal and without jurisdiction.

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 D. 966. The report of the case has, however, not been produced before us.

5. A Bench of this Court consisting of Sir Shah Mohammad Sulaiman, C. J. and King, J in Sandal Singh Vs. Dist. Magistrate and Superintendent took the view that the mere fact that a person after his arrest was temporarily released on bail pending further enquiry does not oust the jurisdiction of the High Court u/s 491 of the Code of Criminal Procedure. We need hardly say that what was true of section 491 is also true with regard to a writ of habeas corpus issued under the provisions of Article 226 of the Constitution of India. The decision in Sandal Singh's case Sandal Singh Vs. Dist. Magistrate and Superintendent , was followed by a Division Bench of the Madhya Pradesh High Court in Mohammad Zahural Huque v. The State 51 Cri. L. J. 731 Mohammad Zahural Huque Vs. State, It appears from this decision that the Madhya Pradesh High Court had taken the same view in another case decided u/s 491 of the Code of Criminal Procedure by a learned single Judge of that Court and reported in 1945 Indoro Law Reports 143.

6. It is well known that a writ of habeas corpus is issued not only in a case of actual confinement but also in the case where there are means to enforce it (see Extraordinary Legal Remedies--Ferris, 1926 Edn. p. 31) where the law on the subject has been stated in the following words:

"There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officers, with a writ in his hands for the

arrest of a person, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in the presence of it. It is the physical power which controls him, though not called into demonstrative action. In other words, illegal restraint may exist without the actual exercise of force or coercion."

It would also be profitable to reproduce paragraph 14 at page 32 of the same book:

"The test as to the right to the writ is the existence of such imprisonment or detention, actual though it may not be, as deprives one of the privileges of going when and where he pleases. Actual physical restraint, as confinement "in jail, is not necessary. Obviously, the extent and character of the restraint which justifies issuance of the writ must vary according to the nature of the control which is asserted. Petitioner must be in such control or custody of the person against whom the petition is directed that his body can be produced in court."

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.

8. Section 499 of the Code of Criminal Procedure deals with the bond of the accused and the sureties and reads as follows:

"499(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient "sureties conditioned that such person shall attend" at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) If the case so required, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(3) For the purpose of determining whether the sureties are sufficient, the Court may, if it so thinks fit, accept affidavits in proof of the facts contained therein relating to the sufficiency of the sureties or may make such further inquiry as it deems necessary." (Underlined (here into " ") by us)"

9. Section 500 of the Code, which deals with discharge from custody, runs as follows:

"500(1) As soon as the bond has been executed the person for whose appearance it has been executed shall be released; and, when he is in jail, the

Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, Section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed."

Section 502 of the Code gives the sureties a right to get the bail cancelled at any stage. That provision reads as follows:

"502(1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) "On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him."

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties. and, if he fails to do so, may commit him to custody, (Underlined (here in " " --Ed.) by us)"

These provisions reveal that the right to continue on bail is subject not only to the directions of the Court but also to the will of the sureties and the mere fact that a person has been released on bail does not lead to the inference that he is at liberty. It is something in the nature of being in the custody of the court through the agency of the sureties. A person, who is on trial, attains liberty only when he is acquitted and not before that. This is apparent from the provisions of Section 367(4) of the Code of Criminal Procedure which reads as follows:

"If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty."

This provision applies not only to the case of persons who are in actual physical custody in jail but also to those who have been released on bail. Section 514 of the Code provides for the forfeiture of a bond, inter alia, on the ground that the person released on bail has not appeared before the Court on the day appointed by it. A study of all these provisions leads us to the conclusion that the so-called liberty obtained by means of a bail order is a very limited one and cannot be said to be free of restrictions.

10. For the reasons mentioned above, we are in respectful agreement with the views expressed by this Court in Sandal Singh Vs. Dist. Magistrate and Superintendent

11. Mr. Tripathi, the learned Additional Government Advocate, has invited our attention to certain decided cases and certain passages in Halsbury's Laws of England and Extraordinary Remedies by Ferris in support of the contention that a person released on bail is not entitled to maintain a petition for habeas corpus.

He first Invited our attention to the following passage in Extraordinary Legal Remedies by Ferris at p. 33:

"Petitioner must be In such control or custody of the person against whom the petition is directed that his body can be produced in court. Therefore the writ will not lie where the party is permitted to go at large without apparent restraint, as where the order of court read "that the defendant may depart without giving any recognizance, subject to the issuing of a new warrant, if ordered by this Court"; "where petitioner is out on bail; or when no effort is being made to enforce a judgment ordering commitment, and defendant is at liberty on bail pending motion for a "new trial," as he is on bond, and is constructively in the custody, not of the sheriff or the court," but of his bondsmen. (Underlined (here in " "-- Ed.) by us).

12. The statement that a writ of habeas corpus would not lie if the petitioner is on bail is based upon Stallings v. Splain (1919) 253 US 339 and Hyde v. Nelson 287 Mo. 130. The facts of the first case, to quote Mr. Justice Brandeis, are as follows:

"Stallings was indicted in the district court of the United States for the district of Wyoming for embezzling moneys entrusted to him as United States Commissioner. Being in the district of Columbia, he was arrested there by Splain, marshal for the District, and was detained to await the institution of proceedings for his removal. In making the arrest Splain had relied, not upon a warrant issued by a commissioner for the District, but upon a bench warrant issued to the marshal for the district of Wyoming on the indictment. Stallings filed immediately in the Supreme Court of the District of Columbia a petition for writ of habeas corpus, contending, for this reason, apparently, that the arrest and detention were illegal. The writ issued; Splain produced the body; the hearing on the writ was postponed; and Stallings was admitted to bail."

The argument that was advanced on behalf of Stallings was again, to quote from the judgment, as follows:

"(a) because the original arrest and detention on the bench warrant were illegal and the later proceedings before the commissioner were without jurisdiction, since he could not legally be re-arrested for the same offence until the habeas corpus proceeding had been disposed of; (b) because the affidavit and the indictment fail to charge a crime against the United States."

Mr. Justice Brandeis dismissed the petition on the following four grounds:

- (1) The original arrest and detention were lawful.
- (2) He was no longer in the custody of Splain. It would be profitable at this stage to reproduce the exact words of Mr. Justice Brandeis:

"When Splain, in obedience to the writ, brought Stallings before the court, "lie passed from the custody of the marshal into that of the court, and be remained

under its protection and control although enlarged on bail." (Underlined (here in "--Ed.) by us) But he did not thereby become immune from all other process until the habeas corpus proceedings should have been finally disposed of."

(3) "The admission to bail by the commissioner to answer the indictment in the district of Wyoming was upon his own request, on advice of counsel. When this bail was given, no application had been made to the court for his removal; and there had not even been an order of the commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention, and who has been released on bail pending the habeas corpus proceeding."

The fourth ground reads as follows:

"Stalling"s contention that he should be discharged because the indictment failed to charge a crime under the laws of the United States is also unfounded. He was "indicted u/s 97 of the Penal Code, which declares that any officer of the United States who shall embezzle any money which may have come into his possession in the execution of such office, or under claim of authority as such officer, shall be punished."

13. As the four grounds on which the judgment in (1919) 253 US 339, is based would show it was not a case like the one before us. In that case the writ was sought against Splain in whose custody, at the time when the petition was disposed of by Mr. Justice Brandeis, Stallings no longer was. The case is also distinguishable on the ground that unlike the case of Stallings, where the proceedings were not contested, in the present case the proceedings are being contested. The main ground on which the decision in (1919) 253 US 339 is based is that Stallings no longer was in the custody of Splain but in that of the court and inasmuch as proceedings before the court were not contested, the right to maintain the habeas corpus petition did not exist.

14. For the reasons we have already mentioned above, this case is no authority for the facts before us. On the other hand, we may point out that Mr. Justice Brandeis has clearly held that a person enlarged on bail remains under the protection and control of the court, a conclusion which is in conflict with his being at liberty. The case of 287 Mo 130 was not made available to us.

15. Mr. Tripathi next placed reliance upon *Wales v. Whitney*, (1884) 114 US 564 and the following passage has been brought to our notice:

"Some thing more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement "or the present means of enforcing it"" .

(Underlined (here in " " Ed.) by us). It cannot be denied that so long as a person is not acquitted and is awaiting his trial, there are always means present for enforcing his arrest or custody. This case, therefore, does not, in our judgment, support the contention of the learned Additional Government Advocate.

16. The learned Additional Government Advocate then placed reliance upon *Syed Mahamad v. Secy. of State*, 30 Ind App 154 (PC). That case, in our opinion, is also clearly distinguishable. The Judicial Committee had to consider not the scope of the writ of habeas corpus but that of an action for damages for false imprisonment. The question raised was one of limitation and the argument advanced was that the period of limitation for a suit for false imprisonment being one year from the termination of the imprisonment, the date on which the plaintiff was released on bail would be the starting point of limitation and the period of one year would run not from the date when he was acquitted but from the date when he was taken out of jail. The considerations which are material for deciding a question of limitation in an action for damages for false imprisonment are completely different from those which are relevant for the issue of a writ of habeas corpus. It is well known that it is one of the fundamental rights enjoyed by a citizen in every free country of not being Retained in custody except under the authority of law. This principle of English Law is accepted not only in England and the United States but in all other countries where law exists. While dealing with the question raised before them in the case mentioned above, the Judicial Committee observed as follows:

"Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. The leading case on the subject is the case of *Bird v. Jones* (1845) 7 QB 742, in which Coleridge, Williams and Patteson, JJ. differed from Denman, C. J. "Some confusion", said Coleridge, J., "seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it concludes the notion of restraint within some limits defined by a will or power exterior to our own." William, J. speaks of imprisonment as being "entire restraint", and Patteson, J. adds, "imprisonment is, as I apprehend, a total restraint of the liberty of the person for however short a time, and riot a partial obstruction of his will, whatever inconvenience it may bring on him."

As is evident from what the Privy Council has said they had to consider what the word "imprisonment" means and not what the expression "liberty" means. This decision, in our judgment, does not also support the contention of the learned Additional, Government Advocate.

17. Next reliance was placed upon a Single Judge decision (*Wanchoo, J.*) of this Court in *Mool Chand and Others Vs. Emperor*, . The learned Single Judge took the view that where a remedy by way of an application for bail to the appropriate Court is available and open to the applicant, his application u/s 491 of the Code should be dismissed. Obviously the attention of the learned Single Judge was not drawn to the case reported in *Sandal Singh Vs. Dist. Magistrate and Superintendent* with which he was behind. Apart from it, this case is not an authority for the proposition that if bail has been obtained, a writ for habeas corpus would not lie. This case deals not with the jurisdiction of the Court to

issue a writ of habeas corpus, if "release can be obtained by means of bail, but with the propriety of issuing a writ of habeas corpus when the same result can be obtained by means of a bail application. In the first place, this case is clearly distinguishable. Secondly, it is in the teeth of a Division Bench decision of this Court to which we have already made a reference above. This case can also not be considered to be good law in view of the decision of their Lordships of the Supreme Court in Gohar Begam Vs. Suggi alias Nazma Begam and Others, . Mr. Tripathi also placed reliance upon Purshottam Singh Vs. Superintendent, Central Prison, . This case also does not touch the point that is before us, the same being whether a person who has been let out on bail and is awaiting trial, can move an application for a writ of habeas corpus. This case, therefore, need not detain us.

18. Mr. Tripathi brought to our notice paragraph 56, Halsbury's Laws of England, Vol XI at page 33, which reads as follows:

"The remedy at common law for the improper refusal of bail was by writ of habeas corpus. Application for bail in felony or misdemeanour may still be made by summons before a judge at chambers for a writ of habeas corpus, but in practice this remedy has been superseded by the statutory procedure for securing release on bail.

An exception to the authority of the courts to admit to bail is where the commitment is for a contempt or in execution. Thus, the courts will refuse habeas corpus to admit to bail or to discharge out of custody where a person has been committed for contempt by the House of Lords or the House of Commons; for the adjudication that an act is a contempt or breach of privilege amounts to a conviction, and the commitment in consequence is execution."

What this paragraph means is that, whereas in former times, it was possible to obtain release on bail by means of an application for a writ of habeas corpus, it was no longer possible to do so now. The reason for this really is well known, the same being that for the grant of bail even in England now there are statutory provisions. The law as to cases in which a writ of habeas corpus can be moved has been stated in paragraph 41, Vol. XI, Halsbury's Laws of England, Simonds Edn., at page 24, in the following words:

"The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Where the detention of an individual is under process for criminal or supposed criminal causes the jurisdiction of the Court & the regularity of the commitment may be inquired into. Where the restraint is imposed on civil grounds under claim of authority, the legal validity of that claim may be investigated and determined, and where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, those claims may be inquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person. In other cases, where the personal freedom of an individual is wrongfully interfered with by another, the release of

the former from the illegal detention may be effected by habeas corpus. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in habeas corpus."

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.

20. On merits, it is admitted on behalf of the respondents that no order setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be enforced, and the number, character and class of sureties had been recorded in this case. Mr. Ganga Prasad, the Magistrate who is trying this case has, in paragraph 11 of his affidavit admitted that position but has stated that it was due to inadvertence. The learned Additional Government Advocate has vehemently contended that even though there may not have been a proper compliance of the provisions of Section 112 of the Code of Criminal Procedure, there has been in substance proper compliance inasmuch as the notices that were issued to the petitioner and others who were being proceeded with him, contain all that is provided for by Section 112 of the Code. To supplement the submission, Mr. Tripathi has further urged that the notices were issued the same day on which the Court took cognizance of the case, that is to say, on 16th of October, 1961.

It is well established that if the law require a thing to be done in a particular manner, it has got to be done in that manner or not at all (Sec. AIR 1936 253 (Privy Council) and The Parbhani Transport Co-operative Society Ltd. Vs. The Regional Transport Authority, Aurangabad and Others, . It is also well known that public orders have got to be read objectively and cannot be read in view of the explanations subsequently given by the officers who passed the orders. See Commissioner of Police, Bombay Vs. Gordhandas Bhanji, where it was observed as follows:

"We are clear that public orders, publicly made; in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

21. What is true of public orders made by administrative authorities is true still

with regard to the orders made by the judiciary. It is, therefore, not possible for us to act on the explanation given by the learned Magistrate that even though he did not record any order that "he was satisfied on the perusal of the reports that in the interest of the maintenance of peace, the issue of warrants was necessary." The question, therefore, that remains for consideration is whether the provisions of Section 112 are mandatory or merely directory and if their disregard is only a curable irregularity. The Supreme Court has in several cases had occasion to consider as to when a provision must be construed to be mandatory and when it should be held to be directory. Their Lordships have held that much does not depend upon the use of the word "may" or "shall" in the provision. No hard and fast rule can be laid down for deciding whether any particular provision in a statute is mandatory or directory. The Court has to consider not only the actual words used, but the scheme of the statute, the intended benefit to public of what is enjoined by the proviso and the material danger to the public by contravention of the same. (See *Banwarilal Agarwalla Vs. The State of Bihar and Others*,). The scheme of the provisions of Chapter VIII in general and that of sections 112 to 114 of the Code of Criminal Procedure is that until an order contemplated by Section 112 is passed, the information received by a Magistrate remains only an information which has not been checked and can thus provide no foundation for subsequent proceedings in the case. It is only after the Magistrate has passed the order u/s 112 that he can proceed further.

22. We are, therefore, of the opinion that the provisions of Section 112 are mandatory and not merely directory in their nature and its disregard cannot be treated to be a mere irregularity. This conclusion is borne out from the language of Section 112 itself which provides that if the Magistrate deems it necessary to require any person to show cause under such section, he is to make an order in writing as provided by that section. The view that we are taking finds support from a decision of this Court in *Emperor v. Rameshwar* ILR 36 All 262: (AIR 1914 All 466) where Knox, J. observed as follows:

"In any case, a Magistrate acting under Chapter VIII of the Code has no power to act until after he has recorded an order in writing u/s 112. If this case had been properly dealt with, the Magistrate should, u/s 112, have made an order in writing 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. That should then and there have been read over to Rameshwar and others u/s 113."

The Madras High Court in *Krishnaswami Thatha chari v. Vanamamalai Bhashiakar* ILR 30 Mad 282 took a similar view. In that case no order was passed u/s 112 of the Code of Criminal Procedure and the Madras High Court observed as follows:

"No such order was passed. The omission was a non-compliance with an express provision of the law, and therefore, renders the subsequent proceedings invalid."

The Nagpur High Court in *Narsayya Lachmayya v. State*, AIR 1953 Nag 292 took

a similar view. That Court expressed itself in the following words:

"The failure of the Magistrate to pass an order was not a mere irregularity, but constituted an illegality. There is an express breach of a mandatory provision of law if a warrant is issued without making an order in writing u/s 112."

23. It is not necessary to multiply authorities in support of our view. We may only state that no case has been brought to our notice where a contrary view has been taken.

24. The question that now remains for consideration is whether the provisions of Section 112 have been complied in substance, if not in form. Chapter VIII of the Code of Criminal Procedure contemplates three things: It contemplates a summons, a warrant and a notice. A notice, therefore, is not to be confused with a summons. Whereas a summons and a warrant is issued for the appearance of a person, a notice is issued in order to enable him to comply with the directions of the Court and to indicate to him the substance of the allegations against him so that in the inquiry which is to follow, he may be able to meet the case against him. In the present case, the Magistrate issued separate notices to each of the persons who were on their trial along with the petitioner. A perusal of Section 112 would show that if an order in writing is passed setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties and the same is read out to the persons who are being proceeded with the same would constitute the notice. Section 112 does not speak of a notice different from the order mentioned therein.

It is true that Section 115 provides that every summons or warrant issued u/s 114 shall be accompanied by a copy of the order made u/s 112. Mr. Ansari has contended that this provision would show that a separate notice has got to be issued, i.e., different from the order contemplated by Section 112 of the Code. The submission is that even though the notice is only a copy of the order passed u/s 112, it has got a separate existence. As we have already pointed out, Section 112 of the Code only mentions the order. In case the persons charged are present, that order is read out to them and that would amount to the notice and no further notice is required to be issued to them. In case, however, they are not present, then a copy of the order has got to be sent to them along with a warrant or a summons, as the case may be. From this it is clear that there has to be no separate notice from the order u/s 112 of the Act.

In the present case, what has been done is that instead of there being one order on the order-sheet or on a separate piece of paper in the file, the Magistrate issued notices giving the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties required. All the notices that have been issued in the present case have been signed by the Magistrate. In fact, if the words "notice u/s 107/112, Cr.P.C." are removed from the top, what was sent to the petitioner

and others jointly tried with him would be the order u/s 112 itself. In that view of the matter we are satisfied that in substance, the provisions of Section 112 have been complied with. The petitioner is being proceeded with u/s 107 of the Code of Criminal Procedure. The Magistrate, who is trying him, has jurisdiction to try him. We cannot on the basis of the material before us hold that the trial is illegal or without jurisdiction.

25. Consequently, we are of the opinion that in view of the circumstances operating in this case it is riot possible to hold that the petitioner is being illegally detained.

26. It was next contended by Mr. Ansari that the learned Magistrate committed an error of law in issuing a warrant against the petitioner without first issuing a summons. Reliance has been placed upon the provisions of Section 114 of the Code of Criminal Procedure which reads as follows:

"If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:

Provided that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest."

27. The factual position in the present case is that the Magistrate did not record the order as contemplated by the proviso to Section 114 of the Code and issued a warrant for the arrest of the petitioner. It is clear that Section 114, requires that in case the person charged is not present in court, a summons shall be issued requiring him to appear and a warrant shall be issued only if that person is in custody, in which case the warrant shall be directed to the officer in whose custody such person is, directing that person to bring the person charged before the Court. It is only in a case where breach of peace is apprehended and there is a report to that effect and the Magistrate feels satisfied that the immediate arrest of the person charged is necessary that he can issue a warrant. In the present case, though a report for the immediate arrest of the petitioner was made by the police, there is no order of the Magistrate showing that it was necessary to do so. It is clear, therefore, that there has been an infringement of the provisions of Section 114 of the Code of Criminal Procedure.

28. The question, however, that requires consideration is whether Section 114 is a procedural section or a substantive section and whether its disregard is a mere irregularity or vitiates the proceedings being an illegality. The enacting clause of Section 114 clearly provides that a Magistrate has to issue a summons for the appearance of a person against whom proceedings under sections 107, 108, 109 or 110 have been started and only if such person happens to be in custody that a

warrant has got to be issued to the person in whose custody he is to produce him before the Court. It is trite that the proviso only culls out an exception from an enacting clause. The proposition is so well known that no authorities are needed to be cited in support of it. However, if one were necessary, reference can easily be had to Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . The proviso has always got to be strictly construed because it is meant to curtail the scope of the enacting clause,

Under the proviso to Section 114 it is only when there is a report of an apprehension of a breach of the peace and the Magistrate is satisfied about its correctness that he may issue a warrant for the arrest of such person provided that he records an order in writing showing his satisfaction for the step that he has taken. It cannot be denied that recording of the reasons in writing is a condition precedent to the exercise of the power conferred by the proviso. It is well established that if the initial condition required to be fulfilled, before a duty is performed, has not been fulfilled, the duty cannot be performed. (See The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others, We have already said above that if the law requires a thing to be done in a particular manner, it shall Be done in that manner or not at all, Behind the rule that before an order is passed directing the arrest of a person u/s 114 of the Code, there are considerations of public policy, the same being that inasmuch as the ultimate order that can be passed in a case under Sections 107, 108, 109 and 110 is only for furnishing security and not for confinement in jail, a warrant for his arrest should not be issued.

29. Having carefully considered the scheme of Chapter VIII in general and of Section 114 of the Code of Criminal Procedure in particular, we have come to the conclusion that the provisions contained in the Proviso to Section 114 are mandatory. In the case of Babu Ram v. Rex AIR 1949 All 21, a learned Single Judge of this Court held that a Magistrate has no power to order arrest of a person with a view to take action u/s 107 of the Code and the proper course was to formulate then and there an order u/s 107 read with Section 112 and serve it on the persons concerned and then it would be open for the Magistrate to order their arrest u/s 114. In the present case, however, the petitioner has not been arrested and it appears that the warrant was never executed. Learning of the proceedings pending against him, the petitioner appeared on 20th of November in court and executed his personal bond and also furnished sureties for his appearance on subsequent dates.

The same day the court sent a communication to the Station Officer police station Kotwali asking him not to execute the warrant and to return it back unexecuted. The warrant had been sent from the court on the 17th of November and on the 20th, as we have already said above, it was withdrawn. Thus, in fact, the warrant was never executed and the petitioner never arrested under it. Consequently, even if there was a disregard of the provisions of Section 114 of the Code of Criminal Procedure, the petitioner has not suffered thereby and, in

any case, he was not detained in custody even for a moment because of that warrant. That being so, the petitioner cannot, in a habeas corpus proceeding, make the issue "of the warrant a ground for his being set at liberty. If the petitioner believes that the issuance of the warrant has rendered the proceedings illegal, he can in appropriate proceedings either before the Magistrate or by means of a revision application or a petition u/s 561-A, Cr.P.C. challenge the same. On that ground he cannot maintain the present petition.

30. For the reasons we have mentioned above, we are satisfied that the petitioner has not made out any case for the grant of prayers made by him. The petition is accordingly dismissed.

31. The record of the case shall be sent back to the trial court forthwith.