1964 *Present :* **Alles, J.**

MRS. S. KANAPATHY, Petitioner, *and* W. T. JAYASINGHE (Controller of Immigration and Emigration) and another, Respondents

S. C. 501/64—Application for a Writ of Habeas Corpus and for Bail pending the determination of the Application

Bail pending habeas corpus *proceedings—Incapacity of Court to grant it—Immigrants and Emigrants Act (Cap. 351), ss. 15 (a), 28 (a).*

During the pendency of an application for a writ of *habeas corpus*, an application for bail in respect of the *corpus* cannot be entertained.

Accordingly, a person who is detained under the provisions of the Immigrants and Emigrants Act will not be admitted to bail pending the hearing of an application made on his behalf for a writ of *habeas corpus*.

[1] *(1908) 1 K. B. 485, 489. affd. (1908) 2 K. B. 441.*
[2] *(1916) 85 L. J. K. B. 1240, 1244 Lord Reading C.J.*
[3] *(1869) L. R. 4 Ex. 126, 130 per Cleasby B.*

APPLICATION for bail pending the determination of an application for a writ of *habeas corpus*.

M. Tiruchelvam, Q.C. with *V. Kumaraswamy* and *M. Amerasingham*, for the petitioner.

G. G. D. de Silva, Crown Counsel, for the respondents.

Cur. adv. vult.

September 8, 1964. ALLES, J.—

When this application was listed before me on 4th September 1964, Crown Counsel asked for two weeks' time to file affidavits. Counsel for the petitioner thereupon made an application that the corpus who had been detained under the provisions of Sections 28 (*a*) of the Immigrants and Emigrants Act (Cap. 351) for a contravention of Section 15 (*a*) of the said Act, be released on bail pending the determination of the application for habeas corpus by this Court. In view of Crown Counsel's application for time to file affidavits, I was inclined to forward the application for bail to the Magistrate so that he may consider whether this was an appropriate case in which bail should be granted and if so the quantum of bail on which the corpus should be enlarged. In making his application for bail, Counsel for the petitioner brought to my notice that in similar circumstances, my brother Tambiah, J., had released the corpus on bail—(vide Habeas Corpus Application No. 78/64 ; S. C. Minutes of 12/3/64). In that case, the question that was considered by my brother was the effect of the provisions of Section 46A of the Immigrants and Emigrants Act as amended by Act No. 68 of 1961, and inasmuch as the corpus had not been charged with any offence to make Section 46A applicable, my brother felt justified in releasing the corpus on bail. But the more important question is, whether in any event, an application for bail, as that term is understood in our law, can be entertained in habeas corpus proceedings. I have had the advantage of the assistance of Counsel on both sides in deciding this question, and at the conclusion of the argument, I made order refusing the application for bail and stated that I would give my reasons later. I now set out the reasons for the order that I have made.

According to Halsbury, " 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 unlawful or unjustifiable detention, whether in prison or in private custody ". (Vol II p. 26, Simonds Edn.) It is therefore essential that any application for habeas corpus should be considered by the Court as expeditiously as possible. Inasmuch as the complaint is one of unlawful detention, the party making the application would be equally interested in having the matter brought up before the Courts with the least possible delay in order to terminate the alleged unlawful detention. If, therefore, pending the hearing of the application the corpus is released on bail without the merits of the application being

considered, *a fortiori*, the party making the application for habeas corpus would have succeeded in the application without the Court considering whether the detention was lawful or not. It seems to me therefore that, in an application for habeas corpus, the concept of the corpus being released on bail pending the determination of the application by the Court is one that is alien to habeas corpus proceedings. Counsel for the petitioner submitted that under the English law, which he said was applicable, in such an event the Court had the power to release a prisoner on bail, and cited in support a passage from Halsbury (Vol. 2. p. 47) where the learned editor says that the Court had " the power to *bail the prisoner de die in diem* pending the argument as to the sufficiency of the writ ". He also relied on the following passage from Short and Mellor " Crown Practice " (1890 Edn.) in support of the same view :—

> " So also in vacation, if a Judge considers the case too important to decide in chambers he may refer it to the Court and *admit the prisoner to bail* to appear in the following sittings. "

Finally he cited the case of *In re Amand* [1], where the application for habeas corpus was made after the applicant was arrested and detained in custody and when he was released on bail. The Court however took the view that it made no difference that the applicant had been released on bail, and dealt with the application as if he were still detained in custody. Presumably the Court had to take this view of a notional detention as otherwise, the application for habeas corpus would not lie. The cases cited by Halsbury in support of the above proposition are very old ones decided between 1647 and 1695, and Short and Mellor apparently refer to a period in the history of the English courts when there were no vacation courts as they exist today. Undoubtedly since the corpus is in the custody of the Court once an application is made, it has power to make such orders as it deems fit with regard to the custody of the corpus pending the determination of the application. When, therefore, reference is made to a power to admit a corpus to bail, the term "bail" must not be understood in the sense that we understand it in the Criminal Procedure Code—the release or setting at liberty of a person arrested or imprisoned either on his own recognizance or upon others becoming sureties for his appearance on a future date—but rather the transfer of control from prison to some other place approved by Court but always to be under the surveillance of Court. Perhaps this situation became necessary owing to the dearth of Courts available in early times to deal with urgent applications and consequently the Judge was compelled to have some make-shift arrangement for the safe custody of the prisoner pending the determination of his application for release. Today, having regard to the multiplicity of Courts to deal with the most urgent matter as expeditiously as possible the necessity of applying for bail in habeas corpus proceedings will hardly arise, and I am indeed doubtful whether the common law of England today permits a person to be released on bail pending an application for a writ of habeas corpus. But,

[1] *(1941) 2 K. B. p. 239 at 249.*

even if the common law of England does permit a person to be released on bail in such proceedings, in Ceylon, the Supreme Court has no common law power to admit persons to bail (*In re Ganapathipillai* [1]). Counsel for the petitioner, to whom I am indebted for the assistance given to me, brought to my notice the case of *Kannusamy v. The Minister of Defence and External Affairs* [2]. I would respectfully agree with the view taken by T. S. Fernando, J., in that case that when a person is arrested and detained in circumstances similar to the present case under the provisions of Sections 28 (2) (*c*) read with Section 28 (8) of the Immigrants and Emigrants Act of 1948 as amended by Act No. 68 of 1961, the Supreme Court has no power to admit him to bail. Counsel for the petitioner sought to distinguish *Kannusamy's* case on the footing that that was a case where the application was by way of a writ of mandamus whereas the present application is one of habeas corpus. It seems to me, however, that whatever may be the nature of the application, it does not affect the *ratio decidendi* in *Kannusamy's* case that whenever a person is detained under the provisions of the Immigrants and Emigrants Act, the Supreme Court has no power to admit him to bail pending the hearing of any application.

In this order I have only dealt with the question of bail. The validity of the removal order is one that has still to be determined by this Court in due course.

Application for bail refused.

[1] *(1920) 21 N. L. R. 491.*

[2] *(1961) 63 N. L. R. 214.*