

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18-08-2015

Pronounced on : 22-12-2015

CORAM :

THE HON'BLE DR.JUSTICE S.TAMILVANAN
AND
THE HON'BLE MR.JUSTICE C.T.SELVAM

H.C.P.No.1721 of 2015

S.Ashok Kumar

..... Petitioner

vs

1. State rep. by
The Assistant Commissioner of Police
R-3 Ashok Nagar Police Station,
Chennai - 600 083.

2. The Inspector of Police
R-3 Ashok Nagar Police Station,
Chennai - 600 083.
Nagapattinam District.

3. Boopathy Chettiar

..... Respondents

Habeas Corpus Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Habeas Corpus, directing the respondents 1 and 2 herein to produce the body of the petitioner's minor son A.Kavin before this Court and set him at liberty.

For petitioner : Mr.Selvakumaraswamy
for Mr.M.Premkumar

For Respondents : Mr.A.N.Thambi Durai
Additional Public Prosecutor
for R1 & R2
Mr.P.Kumaresan for
Mr.V.Ramanan for R3

ORDER

(Order of the Court made by S.TAMILVANAN, J)

This Habeas Corpus Petition has been filed by the petitioner, seeking an order in the nature of writ of Habeas Corpus, directing the respondents 1 and 2 to produce the corpus of his minor son A.Kavin before this Court and set him at liberty.

2. The petitioner has averred in his affidavit that he got married with one B.Mohana Priya, D/o. Boopathy Chettiar, the third respondent herein on 03.06.2009 at Poonamalle, as per Hindu rites and customs and out of the wedlock, the male child, Kavin, the

detenue herein was born on 08.06.2011. The petitioner has alleged that from the date of the marriage, his wife was not taking care of the child at any point of time and she used to go to her job early morning at 6.30 a.m., and return back to the house at around 6.30 p.m., in the evening. According to him, after returning from her job, she used to make phone calls to her friends and family members, after that she used to chat with her friends in the lap top and she was neither a dutiful wife of the petitioner nor a good daughter-in-law to his parents. The petitioner requested his wife to quit the job for the welfare of his son, but she refused to resign the job.

3. It is stated that the wife of the petitioner used to quarrel with him and his family members. Thereafter, on 10.03.2015, when the petitioner got up from the bed to go to bathroom at about 4.30 a.m, his wife was not in bed. The room light was on, so the petitioner entered the room and was shocked to notice that his wife had committed suicide by hanging in the ceiling fan. Immediately, the petitioner informed to the second respondent in person, however, the first respondent registered a case in Crime No.1204 of 2015 on 10.03.2015 for an alleged offence under Section 306 IPC. We are of the view that raising the afore stated allegation against the mother of the minor child is unwarranted in the petition.

4. It is an admitted fact that the petitioner was arrested and remanded to the judicial custody on 10.03.2015. Subsequently, he was released on bail on 16.04.2015 by this Court. According to the petitioner, at the time of his arrest, his minor son, A.Kavin was forcibly taken by the third respondent with the help of the other respondents. The petitioner further stated that he has not seen his son and his whereabouts was also not known to him. After his release on bail, the petitioner went to the house of the third respondent for seeking custody of his son, but the third respondent and his son attacked him and threatened him. Thereafter, the petitioner sent a legal notice on 16.06.2015 to the third respondent to hand over his son. However, wantonly, the third respondent evaded the legal notice and the postal cover was returned with an endorsement "unclaimed".

5. Thereafter, the petitioner preferred a complaint on 14.07.2015 to the second respondent, requesting to hand over his minor son to him. The second respondent, after receiving the complaint, instead of taking action against the complaint, pressured the petitioner not to press the complaint. After not pressing the complaint, the second respondent issued the C.S.R Receipt and gave CSR No.304/R3/2015 on 15.07.2015. Hence, the petitioner has come forward with this Petition, seeking an order in the nature of Habeas Corpus for the relief as stated supra.

6. Per contra, the third respondent, in his counter affidavit has stated that ever since after the marriage with the petitioner, his daughter, mother of the minor child was facing dowry harassment from the petitioner and his family members and the petitioner continued his behaviour in an abnormal manner and a doctor diagnosed the petitioner after performing MRI scan observed that the petitioner was with a character of "Aggressive

Nature", which was present ever since his birth. The continued physical and mental torture had caused irreparable mental agony upon his daughter in her marital home. On 09.03.2015, the petitioner had tortured again the daughter of the third respondent on the guise of demanding dowry and also used physical violence against her. The deceased called his brother on the said night and informed about such tortures. Then on the early morning hours of the next day, i.e, 10.03.2015 at about 4.45 a.m, the petitioner's mother called up the third respondent and his family members and informed that his daughter was dead. Thereafter, the third respondent immediately rushed to the nearest Police Station, being the R3 police station, Ashok Nagar, Chennai and filed a complaint. Based upon the complaint, a case in Cr.No.1204 of 2015 was registered under Section 174 Cr.P.C and later on, further investigation, by the RDO was made and the case was altered into Section 306 IPC and the same is pending investigation with the first respondent.

7. It is further stated by the third respondent that on 11.03.2015 at about 15:00 hrs, the petitioner's brother Mr.S.Senthil, his wife Mrs.Vidya and other relatives brought A.Kavin, aged about 4 years, grand son of the third respondent to his house and handed over the child, requesting the third respondent and his family to take care of the child. Thereafter, in order to provide good education, considering the future of the minor child, the third respondent, being his maternal grand father, admitted the minor, A.Kavin in a well-known Institution at Velammal School.

8. It was further argued that the third respondent, in order to protect the welfare of the child and his safety, approached the Principal District Court, Tiruvallur and filed a G.W.O.P, seeking custody rights and the same is pending before the said Court. Hence, the third respondent requests this Court to dismiss the Habeas Corpus Petition as not maintainable.

9. Learned counsel appearing for the petitioner submits that the petitioner being a father and natural guardian of the detenu, is entitled to the custody of the minor child. As the petitioner was arrested and, soon after coming out on bail, when he sought for custody of the detenu, it was refused, resulting in filing of the Habeas Corpus Petition.

10. Per contra, learned counsel for the third respondent submits that the case has been registered against the petitioner, based on the prima facie materials to substantiate the offence under Section 306 IPC and if the custody of the minor child is entrusted to the petitioner, great prejudice would be caused, therefore, the custody of the child with third respondent need not be disturbed.

11. The short point involved in this Habeas Corpus Petition is whether the petitioner is legally entitled to seek the custody of the child, by way of filing petition, seeking relief in the nature of Habeas Corpus and whether he has to go to the Court for the custody of the child. In this regard, the following decisions were cited by both the learned counsel :

1. Dr (Mrs.) Veena Kapoor v. Shri Varinder Kumar Kapoor, AIR 1982 SC 792.

2. Nil Ratan Kundu & Ans. v. Anhijit Kundu, AIR 2009 SC (Supp) 732

3. Subba Reddy v. Commissioner of Police, (2006) 2 MLJ (Crl) 201

4. B.Kamsala v. Bommi and others, (2005) 1 LW (Crl) 297.

12. In Dr (Mrs.) Veena Kapoor v. Shri Varinder Kumar Kapoor, reported in AIR 1982 SC 792, the Hon'ble Supreme Court has held as follows :

"It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal."

13. In Rosy Jacob v. Jacob A. Chakramakkal, reported in (1973) 1 SCC 840, the Hon'ble Apex Court held that the object and purpose of the Act is not merely the physical custody of the minor but for due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is towards the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship. Hence, merely in the capacity as natural guardian as a matter of right, the petitioner herein cannot seek the custody of the child, since the welfare of the child is paramount.

14. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, reported in (1982) 2 SCC 544, the Hon'ble Supreme Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor, which is the special duty and responsibility of the Court, passing the order and mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

15. In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, reported in (1984) 3 SCC 698, this Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes father as a natural guardian of a minor son. However, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

16. In Mausami Moitra Ganguli v. Jayant Ganguli, JT reported in (2008) 6 SC 634, the Hon'ble Supreme Court has held that the first and the paramount consideration is the welfare of the child and not the right of the parent. It is further observed as follows :

"The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

17. In *Rajesh K.Gupta v. Ram Gopal Agarwal and others*, reported in (2005) 5 SCC 359, the Hon'ble Apex Court has held as follows :

"It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties."

18. In *Subba Reddy v. Commissioner of Police, Chennai*, reported in (2006) 2 MLJ (Cr1) 201, a Division Bench of this Court, has held that though the petitioner is entitled to custody of his minor, which is under lawful custody, such grievance cannot be gone into in a Habeas Corpus Petition, however, he is free to move the appropriate forum to vindicate his grievance.

19. Admittedly, the petitioner is the father and natural guardian of the minor, A.Kavin and the mother of the minor child is no more. The 3rd respondent is the maternal grand father of the child. After the death of her wife, the petitioner herein was arrested and remanded to judicial custody and thereafter, got bail.

20. In the instant case, the petitioner was admittedly arrested in connection with the case of abatement of suicide of his wife and the same is pending. In the mean time, the minor, A.Kavin has been in the custody of his maternal grand father, the third respondent herein, as the child was handed over to the third respondent and his family members by the brother of the petitioner. On the aforesaid circumstances, we are of the view that the claim of the petitioner, seeking an order in the nature of Habeas Corpus is not legally sustainable, since there is no illegal custody of the minor child by his maternal grand father, after the death of the mother of the child.

21. In the light of the decisions of the Hon'ble Supreme Court and this Court, we are of the considered view that the welfare of the child is paramount and further, the HCP is not sustainable, as the petitioner has not made out a case of illegal detention or illegal custody of the child. If the

petitioner is the proper person for the custody of the child, considering the welfare of the child, he should seek his remedy only through the appropriate Court and therefore, this petition is liable to be dismissed.

In the result, this Petition filed under Article 226 of the Constitution of India, seeking the relief in the nature of Habeas Corpus is dismissed, as there is no illegal detention of the minor child by the third respondent. No order as to costs.

Sd/-
Asst.Registrar (J)

/true copy/

Sub Asst. Registrar

tsvn

To

1. The Assistant Commissioner of Police
R-3 Ashok Nagar Police Station,
Chennai - 600 083.
2. The Inspector of Police
R-3 Ashok Nagar Police Station,
Chennai - 600 083.
Nagapattinam District.
3. The Public Prosecutor
High Court of Madras.

1 cc to Mr.V. Rajagopal, Advocate, Sr. 69383

H.C.P.No.1721 of 2015

NM (CO)
kk 8/1

सत्यमेव जयते

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