

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13-08-2015

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.892 of 2015

Subha Petitioner

vs

1. State rep. by
Superintendent of Police,
Nagapattinam District.

2. Inspector of Police
Manalmedu Police station,
Nagapattinam District.

3. Thangamani

4. Santhosh

5. Iniyaraja

6. Tamizhselvi

7. Palaniammal

8. Chitra

9. Ganesan

10. Karunanidhi

11. Karthi

12. Madhuri

13. Kaliyammal

14. Kavitha

15. Anju

16. Bharathi

.... Respondents

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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 to produce the corpus of the detainee, namely, Kaviyasri, D/o. Subha, Hindu, aged about 3 1/2 years before this Court and set her at liberty.

For petitioner : Mr.V.Parthiban
for Mr.A.Saddiq Ali

For Respondents : Mr.A.N.Thambi Durai
Additional Public Prosecutor
for R1 & R2
Mr.S.Ashok Kumar
Senior counsel for
V.C.Selvasekaran for R13

* * * * *

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 to produce the corpus of her daughter, the detainee, Kaviyasri, Hindu, aged about 3 1/2 years before this Court and set her at liberty.

2. The petitioner has averred in his affidavit that she was married to one Menon Babu on 03.09.2010 and out of the wedlock, female child Kavyasri, the detainee herein was born. Thereafter, the husband of the petitioner, who was a drunkard, died by hanging on 26.06.2013.

3. After the demise of Menon Babu, his wife, the petitioner herein stay at her father's house along with the child. On 22.02.2015, the petitioner married another person, one Mr.Suseendran. Thereafter, on 25.02.2015, at 6 pm, while the minor detainee was returning from school, she was kidnapped by Kaliyammal, mother of the deceased and 13 others in a van. Hence, the petitioner went to the respondent police station and gave a complaint against Kaliyammal and 13 others to find out and hand over the child and the respondent received the said complaint on the same day and a case was registered under Sections 147, 363 IPC in Crime No.60/2015. Though, the petitioner went to the respondent police several times, she could get only a lethargic reply. Hence, the petitioner has approached this Court with this Habeas Corpus Petition, seeking for the relief as stated supra.

4. It is an admitted fact that the petitioner herein is the mother of the alleged detainee, Kavyasri and after the death of her earlier husband, father of the detainee, she married, one Suseendran, S/o. Chinnathambi on 22.02.2015. It is the case of the petitioner, mother of the minor detainee that she was staying with her daughter Kavyasri at her father's residence, after the death of her husband. After she married the aforesaid Suseendran on 22.02.2015, Kaliyammal, the 13th respondent and others kidnapped her minor daughter on 25.02.2015 at 6 pm, while she was returning from her school. On the same day, the petitioner lodged a complaint against the said Kaliyammal, paternal grand mother of the minor child and 13 others and a case was also registered by the second respondent in Cr.No.60 of 2015 under Sections 147 and 363 IPC. However, no action was taken by the police till the date of filing of the petition, which necessitated in filing this Habeas Corpus Petition against the respondent.

5. Mr.V.Parthiban, learned counsel appearing for the petitioner submits that only after the demise of her husband, the petitioner got remarried him, hence, she is entitled to get the custody of her child.

6. Mr.S.Ashok Kumar, learned Senior counsel appearing for the 13th respondent submitted that the 13th respondent, being the paternal grand mother is the proper person for the custody of the child, in view of the subsequent marriage between the petitioner and another, after the death of the father of the minor child. Learned Senior counsel also denied that there was kidnapping of the child by the 13th respondent and others. Learned Senior counsel further submitted that the petition filed under Article 226 of the Constitution of India, seeking the relief in the nature of Habeas Corpus itself is not legally sustainable and according to him, the petitioner should approach only the appropriate Court, seeking custody of the child. On the directions of this Court, the minor, Kaviyasri, daughter of the petitioner was produced before this Court.

7. 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 the relief in the nature of Habeas Corpus and whether she has to go to the appropriate Court for the custody of the child. In this regard, the following decisions were cited by both the learned counsel :

1. Athar Hussain v. Syed Siraj Ahmed, (2010) 2 SCC 654
2. Lekha v. P.Anil Kumar, (2006) 13 SCC 555
3. Sultan Akbarsha, K, M.R.,Dr. v.Sultansofia Begum, 1982 LW (Cr1) 139
4. Sheela v. Jeevanlal, AIR 1988 AP 275

8. In *Athar Hussain v. Syed Siraj Ahmed*, reported in (2010) 2 SCC 654, the Hon'ble Supreme Court has decided the scope of Sections 12 and 17 of Guardians and Wards Act, 1890, with regard to interim / temporary custody of minor children and also guiding factors and considerations. Referring various earlier decisions, whereby, the Apex Court has categorically held that welfare of child is the sole and single yardstick to assess comparative merit of parties contesting for custody. Similarly, stability and consistency in affairs and routines of children are important considerations for change of custody of minors in any interim custody proceeding.

9. In *Rosy Jacob v. Jacob A.Chakramakkal*, reported in (1973) 1 SCC 840, the Hon'ble Apex Court has held that in matters of custody, the welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for the custody. Therefore, while deciding the question of interim custody, the Court must be guided by the welfare of the children, since Section 12 empowers the court to make any other, as it deems proper. What is important to note is that the court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the court to change the custody of the minor children with immediate effect. Stability and consistency in the affairs and routines of children is also an important consideration.

10. In *Samuel Stephen Richard v. Stella Richard*, reported in AIR 1955 Mad 451, this Court, while deciding the question of custody held as follows :

"In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not 'ipso facto' entitle him to custody. The principal considerations or tests which have been laid down under Section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under Section 25. The application of these tests casts an 'arduous' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor

and thereafter guide and control the guardian to ensure the welfare of the ward - a no mean task but the highest fulfilment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others."

11. The Supreme Court in *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, reported in (1982) 2 SCC 544, has held as follows :

"The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

12. In *Lekha v. P. Anil Kumar*, reported in (2006) 13 SCC 555, the Apex Court held that as per Hindu law, the natural guardian of a minor child is the father. In the next place, the guardian of a child is the mother. The very principle of guardianship is that there is a presumption that parents will be able to exercise good care in the welfare of their children, if they do not happen to be unsuitable as guardians.

13. Learned Senior counsel appearing for the 13th respondent also cited the decision of a Division Bench of this Court, *Sultan Akbarsha, K.M.R., Dr. v. Sultansofia Begum*, reported in 1982 LW (Cr1) 139, wherein the mother of a child obtained an order for custody as against his father under the Guardians and Wards Act (parties being Mohamedans). Thereafter, the wife, mother of the child was divorced by her husband by pronouncing 'talaq'. Each of them subsequently married different spouse and subsequently, father of the child, filed a petition for a writ of Habeas Corpus against his former wife for the custody of the child, alleging that by reason of remarriage has become disentitled to have custody of the child, as per

Mohamedans Law, saying that a mother, who was entitled to custody of male child only till his completing of 7 years of age. Subsequent to the filing of the writ petition, the mother filed a petition in the District Court under Section 10 of Guardians and Wards Act, praying that she might be appointed Guardian for the minor child. Wherein, this Court has held as follows :

"The petitioner has, undoubtedly, a right in law to invoke the jurisdiction of this Court under Art. 226 of the Constitution for the issue of a writ of Habeas Corpus for causing the production of his minor son in court and for custody being handed over to him. The argument that he has an alternative remedy under the Guardians and Wards Act, and therefore, the writ petition is not at all maintainable is not a tenable contention. At the same time, we must hasten to add that the writ jurisdiction of this Court should not be exercised in such a manner as to bypass the normal remedies available to the petitioner under the Civil law."

14. Referring various earlier decisions, the Division bench held that in case of seeking custody, the Court has to consider the welfare of the minor in all its aspects and not the superiority of the right of the father as natural guardian. Having considering the facts and circumstances therein, the writ petition, seeking an order of Habeas Corpus was dismissed, making it clear that the petitioner therein would be at liberty to approach the appropriate Court, seeking custody of the child. However, the aforesaid decision is not applicable to the facts and circumstances of this case, since the petitioner and the 13th respondent are not in equal footings.

15. Admittedly, the petitioner is the mother and natural guardian of the minor, Kaviyasri and the father of the minor child is no more. The 13th respondent is only the paternal grand mother of the child. The only argument advanced by the learned Senior counsel on behalf of the paternal grand mother of the child is that the petitioner, after the death of her husband, father of the detainee, married another person and therefore, giving custody of the child to the mother would not be in the interest and welfare of the minor detainee.

16. After the death of her husband, the petitioner was free, as per law, to decide her second marriage, accordingly, she married the aforesaid Mr.Suseendran. It is the legal right of the petitioner, which cannot be construed as an illegal act. Merely because the petitioner married another person, after the death of her previous husband, she cannot be said incompetent,

to be the guardian of minor child and seeking custody of the child.

17. Mr.C.Suseendran, who married the petitioner has also filed an affidavit stating that he is willing to take care of the minor, Kaviyasri as a dutiful father, if the custody is given to the petitioner, mother of the minor and he assured that he along with the petitioner will take care of the welfare of the minor child and extend all support to the petitioner for the study and growth of the alleged detinue, Kaviyasri. The affidavit filed by the person, who subsequently married the petitioner would also strengthen the case of the petitioner. As Government is also taking a policy to encourage widows remarriage, holding the view that the mother is not entitled to have the custody, merely because she married another persons would be improper and against social justice.

18. In the instant case, the petitioner is admittedly the mother and natural guardian of the minor, Kaviyasri, whose father is no more. Solemnizing second marriage with another person after the death of her earlier husband is not an illegal or improper act. In the aforesaid circumstances, we are of the view that the claim of the petitioner is legally sustainable, when the claim is made by the mother and natural guardian, seeking custody and that there is no legal embargo for the petitioner in seeking the custody and further, the 13th respondent is not a similarly placed person, seeking custody of the child.

19. On the aforesaid circumstances, we are of the considered view that this HCP is legally sustainable and the petitioner has make out a case that she is the appropriate person to have the custody of the child, who is none other than her daughter, considering the welfare of the child and therefore, this petition has to be allowed.

In the result, this Petition filed by the mother of the minor child, under Article 226 of the Constitution of India, seeking the relief in the nature of Habeas Corpus is allowed and the relief is granted as prayed for. The 13th respondent is directed to hand over the custody of the child, Kaviyasri to the petitioner forthwith. The respondents 1 and 2 are directed to provide necessary assistance in handing over the child. However, there is no order as to costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Superintendent of Police,
Nagapattinam District.

2. Inspector of Police
Manalmedu Police station,
Nagapattinam District.

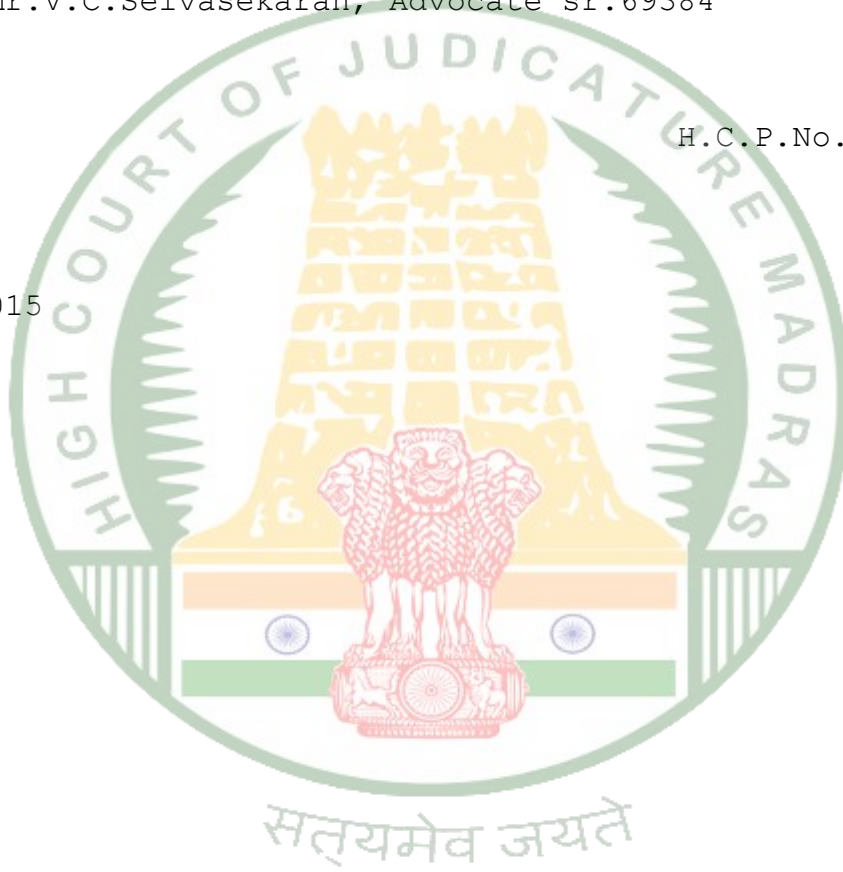
3. The Public Prosecutor
High Court of Madras.

+1 cc to Mr.S.Shankar, Advocate sr.69347

+1 cc to Mr.V.C.Selvasekaran, Advocate sr.69384

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