



H.C.P.No.682 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2023

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR
and

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

H.C.P.No.682 of 2023

Savitha

.. Petitioner

Vs.

1.The Commissioner of Police,
Tambaram City,
Chennai.

2.The Inspector of Police,
Kanathur All Women Police Station,
Navalur, Chennai.

3.Srinivasan

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of habeas corpus directing the respondents 1 and 2 to produce petitioner's minor son XXXX aged about 11 years old, before this Court from the legal custody of the 3rd respondent and hand over to the petitioner.

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For Petitioner : Mr.S.Syed Mazhar Hayath

For Respondents
R1 & R2 : Mr.R.Muniyapparaj
Additional Public Prosecutor
assisted by Mr.N.Narkeeran

R3 : Mr.Abrar Md.Abdullah

ORDER

[Order of the Court was made by M.SUNDAR, J.,]

This order will now dispose of the captioned matter.

2.This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 26.04.2023, which reads as follows:

Captioned 'Habeas Corpus Petition' ['HCP' for the sake of convenience and clarity] has been filed in this Court on 19.04.2023.

2.The nucleus of the captioned HCP is, a 11 years old minor 'xxxxx' [we are masking the name of minor and we shall be referring to the minor as 'absentee' for the sake of convenience and clarity and for obvious reasons]. Central theme of the captioned HCP is, petitioner and third respondent were married in 2008, absentee was born from



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this wedlock followed by a *ex-parte* decree of divorce separating the two. Thereafter, the petitioner contracted a second marriage with one Sivaprakash in 2022. In the *interregnum*, the third respondent had moved jurisdictional 'GAWA' ['Guardians and Wards Act, 1890'] Court vide O.P.No.18 of 2017 seeking custody of the absentee and after full contest i.e., oral and documentary evidence on both sides, GAWA Court in and by an order dated 18.12.2017 negated the custody plea of the third respondent and partly allowed O.P.No.18 of 2017 to the extent of interim custody of the absentee during school holidays with a specific directive that the absentee should be handed over to the petitioner / mother. To be noted, GAWA Court has returned a specific finding that the absentee growing up with the mother (petitioner) would only be better for the future and will be in the interest of minor i.e., absentee.

3. When things stood thus, it is the allegation of the petitioner that on 23.02.2023 third respondent along with two others (advocates according to petitioner) entered the petitioner's house and took away the absentee by force. The petitioner lodged a complaint with the jurisdictional police on 23.02.2023 and a CSR was issued. It is submitted that the petitioner has lodged a complaint with the first respondent also on 11.03.2023 and the same was forwarded



to second respondent. This was followed by reminder to the first and second respondents on 05.04.2023 is learned petitioner counsel's say.

4.Issue notice to all the three respondents.

5.Mr.R.Muniyapparaj, learned State Additional Public Prosecutor, assisted by Mr.M.Sylvester John, learned counsel who accepts notice for respondents 1 and 2 (official respondents), submitted that for the purpose of preliminary enquiry, a notice was issued to the third respondent by the second respondent police calling upon the third respondent to come over to the police station for enquiry but the third respondent sent a written reply dated 20.03.2023 saying that he has filed CMA against aforementioned GAWA Court order in Madras High Court.

6.Today, the petitioner is present in Court.

7.Ms.R.Pavithra, learned counsel of M/s.Sri Balaji Law Associates (Law Firm) with address for service at No.257, Canara Bank Building, Angappan Naicken Street, Parrys, Chennai-600 001, who is present in Court today submits that she has instructions to represent the third respondent and she would be filing the vakalatnama. Be that as it may, learned counsel for third respondent submits that CMP No.8308 of 2022 has been filed on 06.04.2023 and CMP is for condonation of delay for over 1000 days



delay in preferring CMA against the aforementioned GAWA Court order. Learned counsel for third respondent confirms that the absentee is with the third respondent.

8.Let the third respondent remain present in this Court with the absentee tomorrow i.e., on 27.04.2023. Let the second respondent and jurisdictional police [we are informed that the jurisdictional police is Ammapet Police Station, Salem] in coordination with each other ensure the presence of third respondent along with absentee in this Court tomorrow.

9.List this matter tomorrow. List on 27.04.2023.

3.As the earlier proceeding are to be read in as an integral part and parcel of this order, the short forms, abbreviations and short references used will continue to be used in the instant order also.

4.Today, the petitioner, Mr.S.Syed Mazhar Hayath, learned counsel for petitioner, Mr.R.Muniyapparaj, learned Additional Public Prosecutor for respondents 1 and 2 [official respondents], third respondent and Mr.Abrar Md.Abdullah, learned counsel for third respondent and the absentee are before us.



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5.We had an interaction with the absentee and there was also an interaction between the petitioner and the absentee albeit in the Court hall.

6.From the interaction and what unfurled in the hearing today, the following emerge:

- (a) Absentee is with the third respondent only from 23.02.2023;
- (b) Absentee was taken away from the petitioner by the third respondent on 23.02.2023 but it is submitted that it was done as absentee called the third respondent and requested him to take him but we express no opinion on this as we would be relegating this aspect to GAWA Court;
- (c) From the interaction with the absentee, we find that the absentee for the present prefers to be in the third respondent's home. This runs contrary to the GAWA Court order and therefore, we make it clear that absentee being in the third respondent's house will be purely a temporary measure till 15.06.2023 by which time, the GAWA Court has to be moved by the third respondent and parties will stand bound by



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orders of learned GAWA Court. If the GAWA Court is moved, we request GAWA Court to decide the matter as expeditiously as its business would permit but by 15.06.2023;

- (d) As regards appeal against existing GAWA Court order dated 18.02.2017 which is said to have been presented now more than six years later with a delay of over six years and with a petition for condonation of delay of six years, it is open to the third respondent and petitioner to pursue and resist respectively on its own merits and in accordance with law;
- (e) We have also taken note of the fact that there is an allegation of breach of Section 26 of GAWA by the petitioner but again we leave it to the GAWA Court to take a call on the same as we are concerned only with a Habeas Corpus drill;
- (f) As regards the third respondent taking the absentee on 23.02.2023, without approaching the GAWA Court we leave all questions open and let investigation qua the complaint dated 23.02.2023 given by the petitioner to jurisdictional



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Court court, representation/complaint dated 11.03.2023 sent by petitioner to first respondent proceed in accordance with law on its own merits and in accordance with law and be carried to its logical end by respondents 1 and 2;

(g)As regards the response sent by the third respondent to the Police in response to the 41A Cr.P.C. summons also, we leave all questions open and all rights and contentions are left open.

7.We are adopting aforementioned course considering our interaction with the absentee and therefore, this order shall not be construed as legitimizing custody of the third respondent in any manner as that is the domain of GAWA Court which will have to take a call. We also make it clear that this temporary arrangement need not necessarily go on upto 15.06.2023 but it will be only upto the day when the GAWA Court takes a decision. To be noted for the sake of clarity and specificity, we make it clear that the questions as to the absentee's expression in our interaction are left open as there is an allegation that absentee has been tutored and it is not



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out of free will. All these contestations turn on facts heavily and therefore we leave it to GAWA Court to take a call as it is a trial court which can decide on facts by resorting to evidence if required.

8.Captioned Habeas Corpus Petition is disposed of as closed albeit with the aforementioned observations and directions.

(M.S.,J.)

(M.N.K.,J.)

27.04.2023

Index : Yes / No

Speaking / Non-speaking

Neutral Citation : Yes / No

cse

To

- 1.The Commissioner of Police,
Tambaram City,
Chennai.
- 2.The Inspector of Police,
Kanathur All Women Police Station,
Navalur, Chennai.
- 3.The Public Prosecutor
High Court, Madras.

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M.NIRMAL KUMAR, J.,

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