Abu Baker Vs. Sauda Beevi

Abu Baker Vs. Sauda Beevi

SooperKanoon Citation : sooperkanoon.com/726000

Court : Kerala

Decided On : Jun-21-1960

Reported in : 1962CriLJ815

Judge : S. Velu Pillai and; T.C. Raghavan, JJ.

Appellant : Abu Baker

Respondent : Sauda Beevi

Judgement :

S. Velu Pillai, J.

1. This is a petition under Section 491. Sub-section (1), Clauses (a) and (b) of the Criminal Procedure Code, for release from illegal detention, of the petitioner's son aged 11 years, by his mother, the first counter-petitioner. The petitioner had married her in the year 1123 M.E. corresponding to 1947-1948 A.D. and has three children by her, the boy in question being the eldest He divorced her on December 6, 1959, but according to him, his children continued to live with him. On January 4, 1960 a registered release deed was executed by the first counter-petitioner which, while affirming the divorce, declared inter alia, that the children would be maintained by the petitioner, but that, whenever she desired to see any of them the child would be sent to her. The only effect and meaning of this is. that the custody of the children was with the petitioner even after the divorce and at the date of the document.

The petitioner's case is, that after the school closed, the boy was sent to his mother on April 12, 1960, at her request, in the expectation that he would return soon, but that he was being unlawfully detained by her. She has also made an application under Section 488, Crl.P.C. claiming maintenance for the boy from the petitioner. The petitioner lost no time in filing this petition on May 11, 1960. The defence put up by the first counter-petitioner is that the boy had been with her ever since the date of the divorce, that she, and not the petitioner. Is his proper guardian in the circumstances of the case and there is no illegal detention.

2. On the declaration in the release, deed, we entertain no doubt whatever, that the case of the first counter-petitioner, that the boy had been living with her after the date of the divorce, is palpably false and we do not attach any importance to the affidavit of a Moulvi relied on by her, that he had been giving him tuition at her residence. On the other hand, there are affidavits on behalf of the petitioner one by the Kazi of Karamana mosque, and the other by the school teacher, which prove, that the boy was living with the petitioner even after the divorce.

3. It was contended by the learned Counsel for the first counter-petitioner that the proper remedy of the petitioner, is not by way of an application under Section 491 of the Criminal procedure Code, but is under the provisions of the Guardians and Wards Act. Whatever be the state of the law previously, the law has now been authoritatively laid down thus by the Supreme Court in Gohar Begum v. Suggi : 1960 CriLJ164 :

Under the Mohammedan law which applies to this case the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. The position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

The Court also quoted the following observations in R. v. Clarke (1857) 7 E1 and B1 186 : 119 ER 1217:

But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian and when delivered to him the child is supposed to be set at liberty.

The specific objection taken, that the provisions of the Guardians and Wards Act should be invoked in a matter of this kind was over-ruled, the Court observing that the fact that she had a right under the Guardians and Wards Act is no justification for denying the right under Section 491.

4. In the present case, it has not been disputed, that under the Mohammedan law the petitioner is the legal guardian of the boy. In a proceeding of this description under Section 491 too, the welfare of the. minor is a very important point for consideration. The learned Counsel for the first counter-petitioner relied on decided cases, in which the mother was preferred to the father, to be the guardian of the concerned miner in each of them; but they were decided on the special considerations as to the welfare of the minors. The position here is however different.

The petitioner is now a head constable in the Anti-corruption Department and it is stated, that he is expecting a promotion shortly, as a Sub-Inspector in the same Department. The petitioner has two children by his former wife a son who is now studying in the Pre-University Class and a daughter, who had been married by an Advocate. The first counter-petitioner is stated to be living with her father, who is said to be carrying on some trade. There is no question whatever, that the petitioner is well placed in life compared to the first counter-petitioner. It is indeed strange conduct on her part, if her case is true, that she has allowed1 her two younger children to remain with the father, but asserts custody of this boy only; it was' stated on her Behalf that she is intending to start appropriate proceedings to secure their custody.

From what appears, she seeing to have been more anxious to lay a claim against the petitioner for maintenance for this boy, within seven days of his going over to her, than to institute any proceeding concerning the other children. We certainly do not look upon this as evidence of her bona fides. In these circumstances, we have no doubt, that the welfare of the boy demands that his custody must be with the

petitioner.

5. At the last hearing, we had' directed the production of the boy in Court to-day; counsel for the first counter-petitioner could not attend Court today due to some inconvenience. The boy was produced by his mother, and was questioned by us when he indicated his preference to be with her. On his statement, we are convinced, that coming directly from her custody, he is still under her influence. As in Rama Iyer v. Nataraja Iyer AIR 1948 Mad 294 we are satisfied in this case too, that the boy of such tender or immature age, is not able to form an intelligent preference, and we do not place any reliance on his wishes.

6. We therefore come to conclusion that the boy has been under illegal detention by his mother and adopting the form of the order in (1857) 7 E1 and B1 186, referred to above, we hereby release him and set him at liberty by delivering him to the petitioner.