Kamashi Vs. A. Radhakrishnan

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Court : Chennai

Decided On : Feb-17-1994

Reported in : AIR1995Mad60

Judge : Srinivasan and ;Abdul Hadi, JJ.

Acts : Cosntitution of India - Article 226; Code of Criminal Procedure (CrPC) , 1973 - Sections 174; Hindi Minority and Guardianship Act, 1956

Appeal No. : H.C.P. No. 2265 of 1993

Appellant : Kamashi

Respondent : A. Radhakrishnan

Advocate for Def. : N. Pappiah, Adv. and ;A.M. Rajan, Govt. Advocate

Advocate for Pet/Ap. : Mrs. Geeta Ramaseshan, Adv.

Judgement :
ORDER

1. This petition is by the mother of a male child aged about 16 months at the time of filing the petition for issue of a writ of habeas corpus directing the respondents to produce the child and hand over the same to her. The petitioner is the wife of Venkatesan, son of respondents 1 and 2. The marriage took place on 26-4-1991, though in the affidavit of the petitioner filed in support of the petition it was wrongly

typed as 26-11-1991. The child was born on 15-8-1992. Venkatesan died on 9-11-1993, though the petitioner stated in her affidavit that he died on 10-11-1993. According to the petitioner, she was illtreated by respondents 1 and 2, who demanded dowry and on account of their illtreatment, she was living with her parents for about five months prior to the filing of the petition with her child. Her husband took away the child about two months prior to the petition and she caused a lawyer's notice to be issued asking for return of the child, but he did not do so. After the death of her husband, she approached the respondents in order to get back the child but it was of no avail. She gave a police complaint to All Women Police Station. Adyar, with the aid of the Tamil Nadu State Legal Aid and Advice Board. When her parents went with the Police officials to get the child, her mother was beaten badly by the respondents and their friends. She was nursing the child at the time when it was forcibly taken away. She was under tremendous emotional and physical anguish and, therefore, she has filed the writ petition,

2. In the counter affidavit filed by respondents 1 and 2, the following case is set out :-- The respondents never demanded dowry and celebrated the marriage with their money to the tune of Rs. 15,000/-. The petitioner deserted her husband on or about April 15, 1993 and since then the child was only with them. They were bringing up the same with all affection and care. The petitioner left the child voluntarily and never used to feed the child with breast-milk. The child used to take only cow's milk in a bottle from the birth. From the 45th day after the birth, the respondents are feeding the childand it is affectionately attached to them. In the lawyer's notice she only demanded restitution of conjugal rights and not the child. The petitioner had poisoned her husband and his body was found opposite to the house of the petitioner's sister one Mallika, where the petitioner is actually living. The petitioner refused to live with her husband in a Panchayat held on 4-11-1993 at Sholinganallur, Kumaran Nagar. She came on 8-11-1993 to the house of respondents at Teynampet and took her husband in a auto-rickshaw in spite of the protest by respondents I and 2 and on the very same night message came of the death of the petitioner's husband. On 9-11-1993, the petitioner, her sister Mallika and her husband one Raja Bahadur were all missing from their house at Kumaran Nagar and the said Mallika also locked the door and was witnessing the scene from a long distance the people in the village witnessed the escape of the

petitioner and the matter was reported to the police. A case was registered in No. 3434/93 on 9-11-1993 under Section 174 of the Code of Criminal Procedure. The police is awaiting the report from the expert regarding the cause of death. The welfare of the child is not in the hands of the petitioner. She refused to accept the son of the respondents and also never cared to look after the child. The allegation that the child was forcibly taken in false and the petitioner was not nursing the child. The child is with the respondents legally. The petitioner has also categorically stated in the panchayat that she left the child at her husband's place as she did not want to live with him and she had thrown away the 'thali'. The petitioner never demanded the child. The petition is not maintainable as the child is not in illegal custody and it was not taken away from lawful guardian. The petitioner is one of the suspects for the poisoning of her husband and the cause is her illicit relationship with one Raja Bahadur, husband of her sister Mallika. The custody of the child was handed over to the respondents by its father and natural guardian even before the desertion by the petitioner. The custody is legal and it cannot be questioned by the petitioner in a writ petition. The respondents are always willingand ready to permit and allow the petitioner to visit their house and show her affection to wards her child and they are the last persons to prevent her.

3. A reply affidavit is filed by the petitioner. She claimed that she knew of her husband's, death only on 10-11-1993. It is said that the child was with her for one year and her husband foreibly took him away. Her husband wanted her to attend a Panchayat but she left Sholinganallur to talk with her father. She had no idea of her husband's death and the circumstances which led to it. According to her, a reading of the document of Panchaya! would show that it was not as per caste practice, as neither her nor her husband's singnature was in it. None of the events mentioned in the Panchayat took place. It is false to state that she took away her husband on 8-11-1993. She was at Gingee when the death of her husband was alleged to have taken place. The complaint to the police is only a counter-blast. The allegation that she was having illicit intimacy with her cousin sister's husband is mischievous and false. She is entitled to the custody of the child as she is the natural guardian.

4. The matter was heard for some time on 22-11-1993. We directed the Government Advocate (Criminal) who was appearing far the third respondent, viz., the Inspector of Police, Teynampct Police Station, to get the records in the criminal case registered under Section 174, Criminal Procedure Code, at the instance of the respondents in order to find out what exactly is the report by the Chemical Analyst. We also directed the petitioner as well respondents 1 and 2 to file affidavits setting out their respective financial position giving full details of the assets held by them, if any, and their respective source of income. We adjourned the matter to 3-1-1994. The matter was again heard on 4-1-1994. As per the records produced by the Government Advocate (Criminal), the deceased had consumed a poisonous substance. But the investigation of the police in that case was not over. We do not want to take note of either that criminal case or the report of the Chemical Analyst as it might form the subjectmatter of an enquiry by a Judicial Magistrate. We proceeded to decide this case on the basis of the evidence which might be adduced herein by the parties. We directed the Master of this Court to record evidence and place it before us without giving any finding. Accordingly, evidence has been recorded by the Master. The petitioner has examined herself and her father as PW 1 and PW 2. She has not chosen to mark any document on her side. Respondents 1 and 2 have examined one A. G. Venkatesan as RW 1, who was one of the Panchayatdars, according to them, the second respondent as RW 2 and the first respondent as RW 3. The respondents have marked as many as four documents Exs. R1 to R4. We heard counsel on both sides on 10-2-1994 and said that we would pronounce our orders on this day and directed the parties on both sides to be present in Court along with the child.

5. We have gone through the entire records as are made available to us. Counsel on both sides referred to the rulings of the other High Court and the Supreme Court. In Marggarate v. Chacko, : AIR1970 Ker1 , a Full Bench of that Court said thus :--

'25. We are therefore, left with the sole question, and the most difficult question as to whether it will be against the interests of the children to give their custody to the mother in accordance with the order of the German Court.

No order of custody can ever be considered to be permanent as situations will alter and the welfare of the children will not be a constant quantity throughout their minority. The only security that the children may have in view of the wreckage of their home is the compenionship of each other and no direction to separate them should be given except perhaps on the consent of the parents after a very careful consideration by them of even aspect of the case.

We have to remember that the children are of tender age even now. The eldest is hardly 4 1/2 years old. The younger one, as we have said, has not yet attained 3 years. A mother'sprotection for such children is indispensable. We cannot think of any other protection which will be equal in measure and substance to that of the mother in such circumstances. We cannot help referring to the eloquent passage of a jurist :

'The reputation of the father may be as stainless crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant: the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The lender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substaitute can supply the place of her whose watchfulness over the sleeping cradle, or walking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate. (Bailey on Habeas Corpus. Vol I, page 581).'

Strong reliance is placed by the petitioner's counsel on the above ruling. No boubt, the normal rule is that when the child is of tender age, it should not be separated from its mother. The burden will be initially on the person who contends that it will be against the interest of the child to allow its mother to have its custody. It should never be forgotten that each case has to be decided on the facts and circumstances thereof and the only relevant question is whether the welfare of the

child will be in jeopardy if it is with its mother.

6. Learned counsel for the petitioner herself referred to the judgment of a Division Bench of the Madhya Pradesh High Court in Veena v. Prahled. : AIR 1976 MP92 . referring to the provisions of Section 6(a) of the Hind! Minority and Guardianship Act, 1956, the Bench said (at p. 93 of AIR) :--

'The clause gives legislative sanction to theprinciple which is now well established that although the father is the natural guardian of the minor child and entitled as such to his custody, the prime and paramount consideration is the welfare of the minor and the custody of a child of tender years should, therefore, remain with the mother unless there are grave and weighty consideration which require that the mother should not be permitted to have the minor with her. For applying the aforesaid rule, we will have to look to the facts emerging from the petition and the return filed before us.'

Referring to the scope of a petition for Habeas Corpus, the Bench observed (at p. 94 of AIR):--

'The ordinary remedy lies under the Hindu Minority and guardinaship Act, or the Guardians and Wards Act, as the case may be, and it is only in exeptional cases that the rights of the parties to the custody of the minor shall be determined on a petition for habeas corpus, which is an extraordinary remedy.'

On the facts of the case, the Bench did not have a sligtest doubt that the care of the child would be taken much better if he was kept with his mother and that it was not in the interest of the minor that the father should be allowed to take its custody.

7. In Veena Kapoor v. Varinder Kumar, : AIR 1982 SC792 , the contest was between the wife and the husband who were not living together, the question was with regard to the custody of 1 1/2 year old child. After laying down the law that in matters concerning the custody of the minor children the paramount consideration was the welfare of the minor and not the legal right of this or that particular party, the Court directed the District Judge to take evidence and make a report to it as to whether the custody of the child should be handed over to the mother taking into

consideration the interest of the minor. It should be noted that even when the child was of very tender age viz., 1 1/2 years, the Court directed recording of evidence to decide the question of the welfare of the child.

8. The petitioner's counsel drew our attention also to the judgments of theSupreme Court in Elizabeth Dinshaw v. Arvand M. Dinshaw, and Poonam Datta v. Krishnalal Datta, : AIR 1989 SC401 , wherein same proposition was reiterated.

9. Learned counsel for the respondents relied on the decision of a single Judge in Salamat Ali v. Majjo Begum, : AIR1985 All29 . It was held that where under the personal law, the mother is entitled to the custody of a minor child, she should normally get the custody, but she may be deprived of it if the evidence on record shows that it would not be in the interest of the minor to give the custody to her. The Court said that the welfare of the minor could be determined only on the basis of the evidence for which opportunity will have to be afforded to the party seeking it.

10. Keeping in mind the.above principles, we proceed to consider the facts and circumstances of this case as evidence from the records. Even according to the petitioner, the child is not with her from the first week of October 1993. According to the respondents, the petitioner left the matrimonial home in April, 1993 preferring to live with one Raja Bahadur, her cousin sister's husband. The moral character of the petitioner has been definitely assailed by the respondents. The petitioner has denied that she had anything to do with the said Raja Bahadur. But, it is seen from the notice Ex. R-2 issued by the petitioner through her lawyer on 27-10-1993 to her husband, the petitioner's address is given as No. 2, Reddiar Street, Kumaran Nagar, Solinganallur, Madras-96, which was admittedly that of her cousin sister Mallika and her husband Raja Bahadur. In the affidavit filed in support of the petition the petitioner has stated that she was living with her parents for the past five months. The petition was filed on 6-12-1993. If she was living with her parents at Ooranithangal, Gingee Town from July, 1993, it is not known how the address of her cousing Mallika was given as her address in Ex. R-2. In her evidence as PW 1, the petitioner denied the suggestion that she was living with her sister Mallika and her husband Raja Bahadur. However, she admitted that the

Panchayatreferred to by the respondents was held in the place of the said Mallika and her husband. The petitioner's father as PW 2 denied the suggestion that the petitioner was living in Solinganallur in October and November. 1993, but admitted that she visited her relative's house and came back to the village In answer to another question he expressly admitted that the petitioner lived in the hnus-of Mallika for some time and came back. RW 1 is examined by the respondents so one of the panchayatdars. He is retired Mechanical Engineering Supervisor, Ordnance Factory. Ministry of Defence. He is a respectable person and no motive is suggested to him as to why he should depose against the petitioner. He has stated in his chief-examination that from the last week of October 1993 till the night of 9-11-1993 the petitioner was residing in Solinganallur and that he himself saw her in the night of 9-11-1993. What is important to be noted is that RW 1 is a neighbour and he is residing at No. 1, Kumaran Nagar 1st Street, Solinganallur, whereas Mallika and Raja Bahadur were residing at No. 2. There is no cross-examination of RW 1 on his statement that he saw the petitioner in the night of 9-11-1993 in Mallika's house. Nor has the petitioner examined either Mallika or Raja Bahadur to disprove the same. There is ho explanation for not examining either of them They might have supported her version that she never stayed with them if the same is true. RW 2 the second respondent herein, who is the mother-in-law of the petitioner has deposed that her son Venkatcshan was found dead in the bus stand which is 50 feet away from Raja Bahadur's house. There is no cross-examination of RW 2 on that statement. In fact, the petitioner has not stated anything in her deposition as to where her husband was found dead, as her version has been that she came to know of her husband's death only on 10-11-1993.

11. It is the specific case of the respondents in the counter affidavit filed as carly as on 15-12-1993 that there was a Panchayat or, 4-11-1993 in which the petitioner stated that she did not want to live with her husband and left the child in her husband's place and that she had also thrown away her 'thali' (Mangala Sutra). In the reply affidavit filed by thepetitioner there is no specific denial of the holding of the Panchayat. But, as stated already, the plea was that the Panchayat was not as per caste practice as the signatures of the petitioner and her husband were not found in it and none of the events mentioned in the Panchayat took place. The

evidence adduced on the side of the petitioner as regards the Panchayat is highly prevaricating. In her chief-examination she has stated that she was called for Panchayat but she could not attend the same because, her parents did not permit her to attend it. In the cross-examination the first question put to her was as to when she met her husband last. She answered. 'I do not remember the month and year; the Panchayat was held on 4th on which date I have seen my husband last'. Again in answer to another question later she said that she was forced by the Panchayat people to put her signature for which she told them that she was not in a postition to put her signature without the permission of her parents. She has deposed that about ten persons were present in the Panchayat and they were all supporters of her husband and no one was present on her side. She has admitted that the Panchayat was held in the place of her sister Mallika and her husband Raja Bahadur. In support of the case of the Panchayat, A. G, Venkatesan, one of the Panchayatdars, whose signature is found in Ex. Rl Panchayat Muchalika, has been examined. According to him, the Panchayat was held in the house of Mallika at the instance of the petitioner, Mallika and the petitioner's husband and his parents. He has also said that on behalf of the petitioner, Mallika, Raja Bahadur qua her younger brother Elumalan attended the Panchayat besides herself and on the other side, her husband and his parents attended. He has stated that the signature of the petitioner and her husband or that of any of the family members was not taken on Ex. R1 and the petitioner refused to sign the same. He has also given the same reason for not mentioning the names of the family members who attended the Panehayat in Ex. R1. On the evidence available on record, it is certainly not possible to hold that there was a concluded Panchayat or that the contents of Ex R1are true. Though we cannot disbelieve the evidence of RW 1 on any account, his deposition itself makes out that there was no concluded Panchayat binding on the peti- ' tioner. We have referred to this aspect of the matter only to point out that the petitioner has not chosen to disclose the truth to the Court. While she has raised a vague plea in the reply affidavit, she has chosen to give different versions in her deposition as to the holding of the Panchayat. Her father PW 2 'has stated that he is not aware of the Panchayat. That is quite contrary to the version of the petitioner that her parents prevented her from attending the Panchayat.

12. When the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is invoked, the person who does so must take the Court into confidence and place all the facts before it without any reservation. If the Court finds that the petitioner has not stated the full truth in relevant matters, it shall refuse to exercise its descretion in favour of the petitioner. Though we arc not giving a finding on the question of Panchayat and the contents of Ex. R1, we hold that the petitioner has not placed all the facts before the Court. The Panchayat is a relevant matter in this case, as, according to the respondents, the petitioner voluntarily left the matrimonial home and the child and admitted the same before the Panchayatdars. If the petitioner had left the child herself in the house of the husband and deserted the same along with her husband, she cannot invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

13. The next aspect of the matter relates to the tender age of the child. The petitioner has claimed that she was breast-feeding the child at the time when it was taken away from her forcibly by her husband. Though in the affidavit filed in support of the petition she has not expressly stated so, and merely alleged that she was nursing the child till it was forcibly taken away, in her notice dt. 27-10-1993 issued to her husband under Ex. R2, there is an averment that she was breastfeeding the child and was finding it difficult without the child. In her chief examination shehas deposed that she was nourishing her son by breast-feeding and that in her community breast-feeding will be given to the children up to 3 to 4 years. In the cross-examination she has deposed that she was breast-feeding the child for about one year which means that she was doing so till August, 1993. Her case that she was brast-feeding the child till October, 1993 when her husband took away the child forcibly gets shaken. RW 2, the second respondent, has deposed that the petitioner was looking after her child only for about eight months after its birth and thereafter, she was doing some business along with her husband that both used to leave the house and the child was living with her. In the cross-examination she has stated that the child was ten months old when the petitioner went away for the purpose of doing business. It has also been elicited from her in cross-examination that the child was about then months when it started living with her. Even according to the case of the petitioner, the breast-feeding of the child stopped in October, 1993. Hence, much reliance cannot be placed on that aspect

of the matter. Now, more than four months have elapsed and it is not possible for the petitioner tp resume breast-feeding.

14. There is neither pleading nor evidence whatever as to whether the petitioner is educated at ail. Excepting the fact that the petitioner has signed her name in the affidavit, in which her initial is written in English, we do not have anything on record to show the extent of her education. Admittedly, she has to depend only on her father for maintaining herself and the child. She does not have any income whatever. Even in the chief-examination she has stated that her father will pay for the expenses of the child. In the cross-examination she has reaffirmed it and said that she is not employed she has no income of her own. Admittedly, it is her father who is looking after her. She has admitted that there are nine members in the family to be supported by her father. She has admitted that her father has two wives and that her mother's name is Rajakantha while the name of her father's other wife in Kamsalas. While she has stated that she is the daughter of the first wife,her father has deposed that she is the daughter of his second wife. There is no explanation for this discrepancy. Her fauther has two other daughters besides the petitioner through his second wife while he has three daughters through his first wife. Though it is claimed in the evidence that she obtained a compensation of nearly Rs. 70,000/- in a Motor Accidents Claims case and that he was doing money lending business besides running a hotel, no record has been produced in support of the same. P W 2 has admitted that he has no money for constructing a house, though he claims to be having huge amounts with him and getting an income of Rs. 100/- to Rs. 150/- per day from the hotel business besides Rs. 2500/- every month by way of interest on loans. Though a typed set containing xerox copies of certain documents has been filed by the petitioner no exhibit has been marked on the side of the petitioner. None of the originals has been produced. The ipse dixit of the petitioner and her father will not help us to hold that the petitioner is having sufficient financial resources to maintain the child. When admittedly she is not having income of her own ans she had to depend only on her father, she ought to have taken steps to prove the financial status of her father and his ability to maintain not only herself but also her child. Of course, we are not now giving any finding on that question. We hold that the evidence made available to us is not sufficient to prove the financial status of the petitioner or her father.

15. The petitioner has stated in her affidavit that she was ill-treated by respondents 1 and 2, who demanded dowry and she had to live with her parents for the past five months before the filing of the petition. She has also stated that when her parents went with the police officers to get back the child, her mother was beaten badly by the respondents and their friends. But, in the chief-examination she has not whispered a word about the cruel treatment given to her or the bearing of her mother when her parents went to the respondents' place for getting back the child. Naturally, no question has been put to her in the cross-examination about the same. PW2 has also not spoken anything about thecruel treatment alleged to have been given to his daughter by the respondents. When a question was put to him as to when disputes arose between the petitioner and her husband, he pleaded ignorance. However, he has spoken to the fact that when he went to the house of the respondents, with the aid of the police to get back the child, they scolded him in filthy language and sent him out. He has not substantiated the version of the petitioner set out in her evidence that her mother was beaten badly by the respondents and their friends. But, the petitioner's counsel has, however, chosen to put suggestions to R.W.2 and R.W. 3 in the cross-examination that they had ill-treated the petitioner cruelly and that was why she left the matrimonial home. When there is no positive evidence on the side of the petitioner to that effect, the suggestions made in the cross-examination are worthless.

16. No doubt the petitioner's counsel haselicited from R.W. 3 that he is in the habit ofconsuming liquor after sun-set. He has deniedthe suggestion that he is an addict. NeitherP.W. 1 nor P.W. 2 has said anything aboutthe drinking habits of R.W. 3. Hence, noreliance can be placed on that circumstanceby the petitioner.

17. Taking into account all the facts and circumstances referred to above, we have no doubt that the petitioner has not placed the entire truth before the Court. As stated already, she has not made out a case for issue of habeas corpus which is an exceptional remedy. It is certainly open to the petitioner to approach the ordinary Courts under the Hindu Minority and Guardianship Act as well as the Guardians and Wards Act and obtain the appropriate reliefs. If the petitioner files a proceeding under the said Acts, the concerned Court shall dispose of the same as expeditiously as possible, within a total period of six months from the date of filing.

It is also open to the petitioner to apply for interlocutory reliefs. The Court shall not be swayed by any of the observations contained in this order.

18. We have already referred to the statement in the counter-affidavit filed by therespondents that they are always willing and ready to permit and allow the petitioner to visit their house to see and show her affection towards the child and that they are the last persons to prevent her from doing so. It is open to the petitioner to go to the house of the respondents and see the child and stay with it at any time. She shall not, however, take the child out of the house of the respondents without getting an order to that effect from the guardian Court.

19. In fine, the petition is dismissed with the above observations and directions. There will be no order as to costs.

20. Petition dismissed.