

B. Vasanthi Vs. Bakthavatchalu and Others

B. Vasanthi Vs. Bakthavatchalu and Others

SooperKanoon Citation : sooperkanoon.com/777888

Court : Chennai

Decided On : Aug-24-1992

Reported in : AIR1993Mad322

Judge : K.M. Natarajan and;Arumugham, JJ.

Acts : [Constitution of India](#) - Article 226; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6 and 26; Code of Criminal Procedure (CrPC) , 1993 - Sections 491

Appeal No. : W.P. No. 3886 of 1992

Appellant : B. Vasanthi

Respondent : Bakthavatchalu and Others

Advocate for Def. : L. Mohan, Adv. and;S. Shanmughavelayutham, Addl. Public Prosecutor

Advocate for Pet/Ap. : S. Doraisamy, Adv.

Judgement :

ORDER

K. M. Natarajan, J.

1. This writ petition is filed under Article 226 of the [Constitution of India](#) directing the respondent herein to produce the bodies of the minor children, Master Karthi and Miss Lavenya, before this court and hand over them to the petitioner.

2. The averments stated in the affidavit filed in support of the petition are briefly as follows:-- The petitioner and the first respondent got married on 14-11-1980. She gave birth to one male child by name Master Karthik now aged about 10 years and a female child by name Miss Lavanya now aged about 7 years. It is further alleged that the first respondent is working as clearing agent in the Madras Harbour. He had illicit intimacy with some girl friends and planned to have a second marriage at the instigation of his parents, who also made arrangements for the second marriage of the first respondent. It is further alleged that the first respondent used to return home in a drunken state and beat the petitioner brutally and if the children interfere, they will also be beaten. She was thrown out of the house when she questioned his behaviour. Thereupon he shifted his house to his parents' house. It is alleged that when the petitioner was beaten and thrown out of the house, her children cried for help. The first respondent beat them and locked them in the house. The petitioner gave a complaint to the second respondent. Inspector of Police to rescue them, but in vain. It is stated that if the minor children are left in the custody of the first respondent, their future is spoiled as they are not given proper education. There is nobody to take care of the children, from morning to evening, when the first respondent used to go for work. Unless the children are given proper education, their future will be spoiled. All her efforts to take back the children proved to be of no avail. The minor children are kept in illegal custody of the first respondent. The first respondent being the father of the children cannot claim any right over the children because he cannot take any interest of the minor children. The paramount consideration is the welfare of the minor children. Hence this writ petition.

3. In the counter-affidavit filed by the first respondent while denying the above allegations it is inter alia contended that the marriage between him and the petitioner was solemnized on 14-11-1980 and Karthik Anand, a male child, aged about 10 years, and Lavanya, a daughter aged about 9 years were born. He emphatically denied that he is in illicit intimacy with girl friends and planned to have

a second marriage at the instigation of his parents and the said allegation is nothing but figment of imagination. He also denied that he used to come late in the night and most of the time in a drunken state. He emphatically denied that he beat the petitioner and also the children if they interfered. It is false to state that he drove the petitioner out of the house. According to him, it is a deliberate falsehood to allege that he beat the children and locked them in the house. Since there was no occasion for the petitioner to give a complaint to the police, the allegation to the contrary is false. He emphatically denied that the female child was stopped from school and that there was nobody to take care of the children from morning to evening and that the minor children are now in his illegal custody. According to him, it is only the petitioner who had never shown any regard or affection for the first respondent since the date of marriage and in order to have her own ways, she used to threaten the first respondent with suicide attempts. He set up a separate residence within six months after marriage in order to have peaceful and harmonious life, even though he is the eldest son of his parents and he had the moral obligation to live with his parents so as to support his younger brother, sister, etc. The petitioner used to pick up quarrels with the neighbours, shop etc. Since there were several complaints, he had no other go except to shift his residence to the nearby area Pammal. The petitioner stayed away from him for over year when she left for her parents' house for her second confinement. After great persuasion, she was made to live with the first respondent in Muthamizh Nagar, Pammal.

4. It is further stated that his first son Karthik Anand was left in the custody of his parents at Pozhichalur and she never used to visit her son even casually all these years, His son is being given education in a reputed school at Pammal. The petitioner used to leave the house after the first respondent went for work and she never gave a proper account of her conduct. Once again, he shifted his residence to another street in the same area for curbing her behaviour. On the contrary, she developed illicit intimacy with one Kirupakaran and she used to receive him in his house. She used to prevent his daughter from going to school, in order to use daughter to pass letters and chits to the said Kirupakaran, After coming to know of the same, through his daughter, the petitioner when questioned admitted about the illicit intimacy and expressed her desire to leave him once and for all. She herself

reduced the terms of separation also the dissolution of marriage by consent in writing and signed the same on 18-10-1990. In the said writing, the petitioner has categorically accepted to leave the children in the custody of the first respondent besides agreeing to present a joint petition for divorce by mutual consent. She did not keep up her words by presenting a joint petition for divorce. Hence, the first respondent was constrained to file the petition for divorce on the ground of mental cruelty in O.P. No. 111 of 1991 on the file of the Sub Judge, Poonamallee. The petitioner entered appearance on 31-1-1992 and had taken time for filing counter. She also filed a petition for interim maintenance for a sum of Rs. 1,500/-per mensem on the ground that she is forced to depend upon her father who is a small agriculturist and that the first respondent is an affluent person earning Rs. 5,000/-per month. It is further stated that it is only the petitioner who had voluntarily left the custody of the children with the first respondent and it was also affirmed by the record of understanding signed by her. She has never shown any affection or interest in the welfare of the minor children. The welfare of the children being paramount is well safeguarded in his hands. In fact, the mind of his daughter Lavanya was polluted by her conduct and her education was spoiled. The first respondent and his parents were giving all care and attention to the children. His son and daughter were studying in IV and II Class in a convent school at Pammal. Admittedly the petitioner has no means to support her and hence it will not be possible for her to give same standard of education, clothing, etc as enjoyed by them in the custody of the first respondent. He prayed for dismissal of the petition.

5. The minor children Karthik Anand and Lavanya were produced before us. We examined them privately in the chambers in the presence of the counsel of the parties on 22-6-1992. When examined, Karthik Anand would say that he is aged about 10 and that he is studying IV Standard in Sabastian School. He has further stated that he is staying in his father's mother's house where his father was staying. When specifically asked whether he is willing to go with the petitioner, he emphatically refused and said that he is not willing to go with his mother. When he was asked about the reason for refusal, he would state that his mother would beat and ill-treat him. When further probed, he would state that he has been separated from his mother for the past three years. Finally, when he was asked whether his father was taking care of him for his studies and food, he said in the affirmative.

Next, when the minor daughter Lavaya was examined, she has stated her name as Lavanya. But she does not know her age. Though she is not able to say for how long she is staying with her father in her grand-mother's house, she would state that from I Standard onwards, she is staying there. She has stated that she is now studying III Standard and that she has been separated from her mother for the past three years. She has also stated that her father is taking care of her and providing food. When she was specifically asked whether she was willing to go with her mother. She has stated that she is not willing to go with her. When she was asked about the reason for the same, she would state that as and when she returned home from school, her mother was not at home. Her mother had beaten her. She returned home late in the night. She has also stated that she is studying in Tagore School. When a specific question was put whether her mother likes her very much, she denied the same and on the contrary, states that her mother likes one Kirupakaran who always accompanied her to cinema. When she was asked as to whether her grand-mother has asked her not to go with her mother, she denied the same.

6. The learned counsel for the petitioner. Mr. S. Doraisamy, mainly submitted that the petitioner being the mother of the children, she is entitled to their custody on the ground of paramount consideration of the welfare of the minor children. He has also submitted that though the children live with their father, the first respondent who is the natural guardian, they are not being looked after well as their father used to go for work during day time and the minor children live in the custody of their grand-parents. In this connection, the learned counsel relied on the decision of this court reported in *Vijaya-lakshmi v. Inspector of Police, Karur Police Station, Karur*, : AIR1991 Mad243 . Per Contra the learned counsel for the first respondent submits that the petitioner never took any interest in the welfare of the children. On the other hand, she developed illicit intimacy with one Kirupakaran, and when questioned, she admitted and also agreed to separate from the first respondent and also agreed for dissolution of marriage by mutual consent and to that effect she has given it in writing as early as 10-10-1990 and in that letter also she accepted to leave the children in the custody of the first respondent, besides agreeing to file a joint petition for divorce. But, she did not subsequently keep up her words for filing a joint petition. Hence, the first respondent was constrained to

file O.P. No. 111 of 1991 before the Sub Judge, Poonamallee. The petitioner entered appearance in that petition as early as 31-1-1992. Sometime later, she has also prayed for interim maintenance on the ground that she is unable to maintain herself and she is depending upon her father, while the first respondent is a person earning Rs. 5,000/ - per mensem. The first respondent would state that the children are admitted in a best convent school and they are studying IV and III Standards and they are looked after very well. Their interest is very well safeguarded by the first respondent and his parents. On the other hand, if the children are left in the custody of the petitioner, in view of the immoral conduct of the petitioner, their future will be spoiled. She is not in a position to provide them good education. Even otherwise these are all matters to be decided only by a competent Civil Court which has already seized the matter in respect of dissolution of marriage and grant of interim maintenance to the petitioner. The petitioner instead of filing necessary petition under the Hindu Minority and (Guardianship Act and Guardians and Wards Act for custody of the children has come forward with this petition on the ground that she being the mother is entitled to custody of the children on the ground of paramount consideration of welfare of the children. He would submit that the petition under Article 226 of the [Constitution of India](#) can be maintained only in certain circumstances and in the instant case none of the ingredients which are necessary for maintaining such petition are made out and on that ground alone, the petition is liable to be dismissed. In this connection, our attention was drawn to the decision in Sampath v. Govindammal, : AIR1952 Mad98 , Rajcswari v. C. M. Bagavathimuthu Pillai, 1979 TLNJ 417, K. M. R. Sultan Akbarsha v. Sultanasofia Begum, 1952 Cri LJ 1617 ; 1982 TLNJ 24. Mrs. Premila Devi v. R. Jayachandran, (1981) 1 MLJ 497 and G. Demodaran v. Smt. Ambikeswari, 1984 TLNJ 151.

7. In G. Damodaran v. Smt. Ambikeswari, 1984 TLNJ 151 rendered by a Division Bench of this court, it was pointed out that in the earlier Bench decision of this court in K. M. R. Sultan Akbarsha v. Sultanasofia Begum, 1982 Cri LJ 1617 : 1982 TLNJ 24 it was observed as follows: --

'The only circumstances in which we can justifiably deviate from the this procedure is where the life, health and morale of the minor are in danger or where the child is

likely to be removed from the jurisdiction of the court clandestinely or within a short time or where the party having custody of the child is ex facie shown to be depraved and immoral character and it will not be conducive to the interest of the minor to leave it in the custody of the person any longer.'

After distinguishing the decision in Gohar Begum v. Suggi, : 1960 CriLJ164 it was ultimately held in G. Damodaran case 1984 TLNJ 151 :

'Therefore the proper course for the petitioner is to take out an application before the proper court for securing the custody of the children. We are not expressing any opinion in this petition about the charges levelled against the respondent by the petitioner and/or the counter charges levelled by the respondent against the petitioner.'

Ultimately, the writ petition was dismissed in that case. In Mrs. Premila Devi v. R. Jayachandran, (1981) 1 MLJ 497 a Bench of this court held :

'The High Court's jurisdiction to grant relief under Article 226 of the Constitution can be invoked only in cases where the other remedies available will not be as effective and efficacious as the one sought to be invoked under Article 226. So far as the present case is concerned, as per law, the father is natural guardian. Technically the custody has to be with the mother if the child is below the age of five. It is only a preferential claim as between the father and mother as regards the custody of the child. There is no extraordinary circumstance in this case to (give) relief under Article 226 of the [Constitution of India](#). The relative merits of the claim for custody have to be discussed and decided after hearing the proper evidence that will be let in by the respective parties. This can be effectively done before the Civil Court constituted under the Hindu Minority and Guardianship Act and also under the Guardians and Wards Act. The Court can give an effective and efficacious relief after assessing the evidence that may be let in by the respective parties regarding their preferential claims over the child concerned. In as much as there is no effective alternative remedy available for the petitioner to agitate her claim, the writ petition filed under Article 226 of the Constitution is misconceived'.

In Sampath v. Govindammal, : AIR1952 Mad98 a Bench of this Court while considering the issue of writ of habeas corpus under S. 491, Cr.P.C. held as follows:--

'An application under Section 491 being in the nature of a summary proceedings, it will not be possible for instance to go into the question of the right of guardianship of the applicant in cases where it may be disputed. Questions such as whether it would be for the welfare of the minor to restore the custody of the minor to the guardian and the taking into account the minor's wishes, if she is of sufficient age and is able to give an intelligent preference, are matters which should legitimately be considered in proceedings under the Guardians and Wards Act and they could not be gone into thoroughly in a summary proceeding. Courts should be reluctant to pass orders in applications under S.491, when such applications are taken by persons, who claim to be the natural guardians and require their wards to be restored to their custody. Unless there is an imminent danger to the health or safety of the minor or to his morals, when an interim order of production would become necessary, parties should be directed to proceed by way of an application under the provisions of the Guardians and Wards Act. The more appropriate, effective and legitimate course to be adopted by an aggrieved person, who seeks to get the custody of his ward, is under the Guardians and Wards Act.'

In Rajeswari v. C. M. Bagavathimuthu Pillai, 1979 TLNJ 417, a Bench of this Court held as follows:--

'It is the Court exercising jurisdiction under the Guardians and Wards Act which could hold a thorough enquiry as to the fitness of the contending parties to have the custody of the minors. Such an enquiry cannot be had in a summary proceedings such as the one now before us. Moreover, as we have already pointed out, unless there is an immediate danger to the health or safety of the minor or their morals, it would be more appropriate for the matter to be dealt with under the Guardians and Wards Act by the Court exercising jurisdiction under the Act and not by this Court in a summary proceedings such as this. We do not, therefore, think it expedient, in the circumstances of the case, when there is a proceeding under the Guardians and Wards Act pending before the learned

District Judge, Chingleput, to issue a writ of habeas corpus.'

A Division Bench of this Court in W. P. No. 17819 of 1991 dated 3-2-1992 (Vaidehi v. I. Gopinath), in which one of us (K.M. Natarajan, J.) was a party, after relying the above decisions, observed as follows:

'The scope of invoking the writ jurisdiction under Art. 226 of the Constitution for issue of habeas corpus against a natural guardian has been clearly laid down in the above decisions and it is clear that if the life, health and morale of the minors are in danger or where the party having custody of the child is ex facie shown to be depraved and immoral character and it will not be conducive to the interest of the minors to leave them in the custody of the person any longer, then only it can be invoked.'

After referring the wishes of the minors in the said case and Sec. 6 of the Hindu Minority and Guardianship Act, this Court came to the conclusion that the petitioner is not entitled to ask for a writ of habeas corpus and the parties were directed to agitate before proper court. The ratio laid down in the above decision squarely applies to the facts of the instant case. As per Sec. 6 of the Hindu Minority and Guardianship Act, the father/first respondent is the natural guardian of the minor children who are admittedly above seven years. It is not in dispute that the father filed a petition for dissolution of marriage between him and the petitioner herein and that it is pending before the competent civil court, namely, Sub-Court, Poonamallee. It is also not in dispute that the petitioner claimed interim maintenance that she is unable to maintain herself and she is depending upon her father and that the first respondent herein is in affluent circumstances. Under S. 26 of the Hindu Marriage Act, the Court before which proceedings are pending has got every jurisdiction to pass interim orders regarding custody of the children. In the instant case, admittedly the children are in the custody of their father for more than a year and the children are admitted in school. The only allegation levelled against the first respondent is that he used to attend office during day time and the children will be in the custody of their grand parents. In the instant case, we have examined the children and their statements have been extracted above and they do not want to go with their mother (petitioner). They have categorically stated that

they are studying and that they are looked after well by their father. The decision relied on by the learned counsel for the petitioner, reported in *Vijayalakshmi v. Inspector of Police, Karur Police Station, Karur*, : AIR1991 Mad243 , is not helpful to the case of the petitioner as in the above quoted case the scope of applicability of Art. 226 of the [Constitution of India](#) was not considered. However, on the facts of the said case, it was held (at p. 245 of AIR) :

'It is admitted that second respondent has converted into Islam and he married a Muslim girl. On account of this, as per the proviso in Sec. 6 of the Hindu Minority and Guardianship Act he has ceased to be a Hindu and hence he is not entitled to act as a natural guardian to the minors. As per this section after the father the mother would be the natural guardian of the minors. Therefore, the second respondent-husband is not entitled to act as natural guardian as a matter of legal right and claim custody of the minors, whereas the petitioner-wife can claim so.'

While holding so, the learned Judges in that case have also taken into consideration the fact that the petitioner-wife is a teacher and she is earning as such and she has also the support of her parents. Immediately after the husband removed the children from her house, she lodged a complaint with the police and then she has come up with the writ petition. The children were also not found living with their father. It is only on the facts and circumstances of the above quoted case and considering the welfare of the children, the Bench came to the conclusion that the children should be left in the custody of the mother giving liberty to the father to take steps in civil court under the Guardians and Wards Act for custody of the children. In view of the ratio laid down in the above decisions relied on by the learned counsel for the first respondent and the facts and circumstances of the case, we have no hesitation in holding that the petitioner is not entitled to invoke the writ jurisdiction and ask for issue of writ of habeas corpus, and the proper course is to take out an application before a competent civil court for securing custody of the children. It is to be noted that a civil court has already seized the matter of the dispute between the petitioner and the first respondent. The question as to who is entitled to custody of the children is a matter to be decided by a competent civil court after giving opportunity to both parties to adduce necessary evidence and after arriving at a finding with regard to

the paramount welfare and interest of the children.

In the result, the writ petition fails and stand dismissed. However, it is open to the petitioner to move the competent civil court for custody of the children under the provisions of the Guardians and Wards Act read with Hindu Minority and Guardianship Act if so advised.

8. Petition dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com