
(2013) 06 AP CK 0079
In the Andhra Pradesh High Court
Case No : Writ Petition No. 28282 of 2012

Abrar Khan Durrani

APPELLANT

Vs

S.M.O.

RESPONDENT

Date of Decision : 28-06-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 97
Penal Code, 1860 (IPC) — Section 114, 120A, 334, 339, 34

Citation : (2013) 4 ALT 323

Hon'ble Judges : K.C. Banu, J; Challa Kodanda Ram, J

Bench : Division Bench

Advocate : Sarva Bhouma Rao, for the Appellant; N. Ashwani Kumar, Counsel for Respondent Nos. 3 to 5, for the Respondent

Final Decision : Disposed Off

Judgement

Challa Kodanda Ram, J.—The Writ of Habeas Corpus is filed by the petitioner seeking a direction to the respondents to produce his son (sic. Abrar Khan Durrani) aged about 18 months before the Court and to give the custody of the child to the petitioner. The brief facts as set out in the affidavit of the petitioner are as follows:

The petitioner is an educationist by profession and is a permanent resident of Kakinada Town. During 2001, he had married with one Shafia Sulthana of Visakhapatnam and subsequently they were blessed with a son by name Nawaz Sheriff Khan Durrani. The 3rd respondent is the brother of Smt Shafia Sulthana. The 4th respondent is unmarried sister of Smt Shafia Sulthana and 5th respondent is nephew of her father-in-law. The 6th respondent is nephew of the petitioner and he is a practising Advocate at Visakhapatnam. Before the birth of Nawaz Sheriff Khan Durrani, with the consent of Mrs. Shafia Sulthana, the petitioner had married with one Syed Kausari and all of them were living happily together at Kakinada. On account of pregnancy, Smt Shafia Sulthana was

residing at Visakhapatnam and delivered a male child. Unfortunately Smt Shafia Sulthana died on 17.1.2012 in a road accident. Thereafter the respondents 3 to 6 with an intention to knock away various properties which were inherited by his first wife Smt Shafia Sulthana are keeping his son in their custody instead of handing over the child to the petitioner who is the natural guardian of the child. It is further alleged that the 6th respondent is a practising Advocate and was also President of Bar Association, Visakhapatnam, for some time. The child is being deprived of his fatherly affection and hence the present writ petition is filed for a direction to the unofficial respondents to hand over the child to the petitioner.

2. A counter-affidavit has been filed by the first respondent stating that on enquiry, it has come to light that the child is in the custody of 3rd respondent and further the 3rd respondent had claimed that the child is being kept under their custody and being taken care of the child in terms of the wish expressed by late Smt Shafia Sulthana, who is the mother of the child through a registered will dated 13.7.2011. The 1st respondent had also stated that the petitioner had filed a private complaint before the I Additional Chief Metropolitan Magistrate, Visakhapatnam under Sections 114, 120A, 339, 334, 344, 347, 369, 379, 384, 386, 407, 424, 447, 451, 452, 477, 506 read with 34 IPC and a case has been registered in Crime No. 291 of 2012 on 13.7.2012. The matter is being investigated and statements of several witnesses including the relatives of 3rd respondent were recorded. The police after completion of enquiry came to the conclusion that the matter is of civil nature and steps are being taken to refer the matter as non-cognizable (civil in nature).

3. A detailed counter-affidavit has also been filed by the respondent No. 3 on behalf of the respondents 3 to 5 denying the allegations made in the writ petition. It is further stated that it is on account of the petitioner's ill treatment, Smt Shafia Sulthana was staying in Visakhapatnam and even for the delivery she chose to be at Visakhapatnam and as a matter of fact, the petitioner never bothered about her. It is also stated that even before the death of Smt Shafia Sulthana, her parents were residing at Visakhapatnam and on account of the ill-treatment of the petitioner, she had executed a registered will on 13.7.2011 mentioning about the properties which she has inherited from her parents and bequeathing all the properties to her son and in the said will, the responsibility of implementing her desire as expressed in the will was entrusted to the 3rd respondent who is none other than Smt Shafia Sulthana's father's brother. The boy Nawaz Shariff Khan Durrani being of tender age, he is required to be taken care of in terms of the wishes of her mother and neither himself nor other respondents are interested in the property of the child but they are only concerned about the welfare of the child. Considering the fact that the petitioner has another wife and has also another child, the mother of the child had entrusted the responsibilities to the 3rd respondent. In the counter-affidavit, it is also stated that the writ of Habeas corpus is not maintainable for seeking custody of the minor child as that relief can be granted by the Family Court at Visakhapatnam after considering the evidence which may be led by the

respective parties before it.

4. Sri K. Sarva Bhouma Rao, learned counsel for the petitioner would urge that a writ petition is maintainable and the petitioner being a father and natural guardian of the child he is entitled to seek for custody of the child and the Respondent Nos. 3 to 5 cannot claim any right under the will. He further submits that through will, the custody of the child or the guardianship of the child cannot be entrusted and in that view of the matter even assuming the will to be genuine and has to be given effect to the same only, it can be limited to the extent of property but not with respect to child's custody and guardianship. He also urges that he had no differences with his first wife late Shafia Sulthana and it is only on account of the influence of the 6th respondent his wife had probably executed the said will and it is only with the design to knock away the property, the respondents are keeping the child and the petitioner apprehends that the child would be harmed by the respondents. As a matter of fact, he seeks adverse inference to be drawn against the respondent No. 6 for not filing any counter by him denying the allegations made in the writ petition. He has relied upon a judgment of the Supreme Court reported in Gohar Begam Vs. Suggi alias Nazma Begam and Others, for the proposition a writ of Habeas Corpus would be maintainable for seeking child's custody notwithstanding the fact that the same relief could be granted by the Family Court under the Guardians and Wards Act. As a matter of fact he points out that the Supreme Court in the judgment had found fault with the High Court. He also relied upon the judgment of Supreme Court reported in Mohd. Ikram Hussain Vs. State of U.P. and Others, for the proposition that the High Court can enquire into by taking the evidence even in Habeas Corpus.

5. These decisions have no application to the facts of the present case. In the facts of that case, the Apex Court had directed the child to be handed over to the custody of mother in whose custody the child was all alone was and it is only for a short temporary period, mother had left the child with her sister. In those circumstances, the Apex Court found fault with the order of that High court in not granting writ of Habeas Corpus and directing the mother to approach appropriate Forum u/s 491 Criminal Procedure Code, 1973. The facts of the present case are entirely different and as such, the ratio of the judgment has no application.

6. On the other hand, the learned counsel for the Respondent Nos. 3 to 5, Sri. N. Ashwani Kumar, relied upon a judgment reported in Smt. Seeta Devi Vs. Mata Pher and Another, held thus:

16. In view of the above discussion, the legal position which emerges is that a writ of habeas corpus should not be issued as a matter of course at the instance of a husband against the parents or other close relatives of the wife. This extraordinary remedy should be confined to exceptional cases. Ordinarily the husband should pursue the remedy provided by Section 97, Cr.P.C or the remedy of restitution of conjugal rights. The above two cases are not of exceptional nature. Consequently, Habeas Corpus Writ Petition No. 4056 of 1997 and Habeas

Corpus Writ Petition No. 8049 of 1997 are hereby dismissed.

7. He also relied upon a judgment of Madras High Court delivered in Habeas Corpus Petition No. 1928 of 2010 on 14.3.2011 (K. Suganya v. The Superintendent of Police and others), held thus:

12. After considering the facts and circumstances of the case, especially the complexity of the issues involved in this case, the fact that the petitioner's allegations is to the effect that the custody of the child was taken by the 4th respondent while the parties were in a foreign country, namely Abud Dhabi, and the further fact that the child and the 4th respondent are now in the said country this Court is of the considered view that the habeas corpus petition filed under Article 226 of the Constitution of India shall not be the appropriate proceedings to make a decision as to who, between the petitioner and the 4th respondent, shall be entitled to the custody of the child. It needs elaborate enquiry, in which opportunity is to be given to both the parties to lead evidence. The same can be conveniently done only in a civil court/family court.

8. In the judgment reported in Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, (K. Suganya's) case was also referred to.

9. Now it is well settled by a catena of judgments with respect to custody of child the paramount consideration the court is required to keep in mind is the welfare and well-being of the child which aspect has to be considered basing on the facts before the Court. In the facts of the case, it is admitted that even before Nawaz Shariff Khan Durrani was born late Smt Shafia Sulthana was living at Visakhapatnam and she had delivered the baby at Visakhapatnam and thereafter she was living there and the child was in the custody of the respondent No. 3 for the past 18 months or so. There is no allegation of child not being taken proper care or the child being ill-treated or mishandled. Further, prima facie for the reasons best known to her, she had executed a will dated 13.7.2011. In the said will she had consciously put the responsibility on the 3rd respondent to manage the property on behalf of the child and had specifically mentioned that the child should be taken care of by the 3rd respondent. Whether in the will, custody of the child and welfare of the child can be entrusted to the 3rd respondent or to some one other than the natural guardian is a question which has to be decided in appropriate proceedings. However, the fact that the mother had consciously named some one other than father of the son as responsible person for the purpose of taking care of the property prima facie is an indication that she is confident of the welfare of the child being in the custody of such person. In the facts of this case, considering the welfare and well-being of the child of a tender age of 18 months, there is nothing wrong in the child being kept in the custody of the 3rd respondent who is none other than brother of the grand father of the child, especially in the absence of any specific allegations of ill-treatment or mishandling of the child.

10. In the light of the settled law that the welfare of the child is the paramount

consideration of the Court and in the facts and circumstances of the case, we are of the considered opinion at this stage that a direction for handing over the child to the petitioner cannot be given. However, we make it clear that the observations and views expressed in this order are only prima facie and the same does not come in the way of the petitioner approaching any Forum including the Family Court at Visakhapatnam seeking custody of the child by initiating appropriate proceedings. In such case, the Courts shall consider the issue of granting of custody of the child in accordance with law un-influenced with the observations made herein. With the above observations, the writ petition is disposed of. No order as to costs. Miscellaneous Petitions, if any pending, in this writ petition shall stand closed.