

(2013) 08 MAD CK 0236
In the Madras High Court
Case No : H.C.P. No. 1445 of 2013

Aisha Rahman Ali

APPELLANT

Vs

Inspector of Police and Another

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Citation : (2013) 4 MLJ(Cri) 28

Hon'ble Judges : V. Dhanapalan, J;C.T. Selvam, J

Bench : Division Bench

Advocate : P. Saravanan, for the Appellant; A.N. Thambidurai, Additional Public Prosecutor (R1) and M. Abdul Razack for Razhaq Associates, for the Respondent

Judgement

C.T. Selvam, J.—The petitioner is the mother of the detenu-children, while second respondent is her husband. They have two minor children, namely Jainab, aged about 3 years and Jawveria, aged about 1 year. By way of this petition, the petitioner seeks production of the detenu-minor children. We have heard learned counsel for the petitioner, learned Additional Public Prosecutor appearing for first respondent as also learned counsel for second respondent.

2. It is alleged that the marriage between petitioner and second respondent was solemnised on 21.12.2008 at Dubai and registered at Personal Status Court, Dubai. After marriage, they lived jointly at Australia. Out of their wedlock, the first detenu-child was born on 31.08.2010 at Mercy Hospital for Women, Heidelberg and the second detenu-child was born at Ganga Hospital, Coimbatore on 06.06.2012. The Government Kazhi, Karur, granted divorce to them on 22.01.2013 and further ordered second respondent to provide expenses of the petitioner and the two detenu-children during the separation period from 06.01.2012 to 11.01.2013 and a settlement amount of Rs. 7,50,000/-, on or before 24.01.2013. It is contended by the petitioner that she was forced to sign papers which were written in Tamil. Though her place of birth is Coimbatore, she was brought up at Australia and cannot read or write Tamil. On 22.01.2013, second respondent kidnapped petitioner's daughters, namely the detenu-

children and immediately, she contacted her relatives to rescue her daughters. In the meantime, she went to Dubai. On 22.07.2013, petitioner lodged a complaint against second respondent to first respondent-Police, who have not taken action and hence, the present petition.

3. The petitioner has filed additional affidavit stating that she has filed divorce petition before Court at Dubai and on 30.10.2012, such Court granted divorce and ordered maintenance. To evade paying maintenance, second respondent forced petitioner to appear before the Government Khazi, who granted divorce on 22.01.2013 and ordered him to provide the expenses of the petitioner, etc., as stated above.

4. Pursuant to the direction of this Court, second respondent is present today along with the minor detenu-children. The counter affidavit of second respondent admits to marriage between second respondent and petitioner and that the children were born out of wedlock. Due to incompatibility, both of them decided to get legally separated and approached the Government Khazi, Karur and obtained a decree of divorce by consent on 11.01.2013 in the presence of seven witnesses. As per the terms of the said decree of divorce, second respondent agreed to pay a sum of Rs. 7,50,000/- towards alimony to petitioner on or before 24.01.2013 and further, it was mutually agreed that two children shall be in second respondent's care and custody. As per the decree of divorce, a sum of Rs. 7,50,000/- was paid to petitioner through her father on 22.01.2013 in the presence of Government Khazi, Karur District. The translated copy of the decree of divorce was also issued by the Government Khazi of Karur District on 22.01.2013 both to petitioner and second respondent. Hence, the contention of petitioner that she is not well versed in Tamil and was forced to sign on paper written in Tamil, is only an after-thought. On 22.01.2013, petitioner's father Rahman Ali and his brother Abdul Rahman received a sum of Rs. 7,50,000/- towards alimony for petitioner in the presence of the Government Khazi, Karur District and they also acknowledged receipt thereof. The custody of the two children was voluntarily handed over to second respondent on 11.01.2013 itself when the decree of divorce was signed by second respondent and petitioner and she is fully aware that the custody of the children was lawfully given to second respondent under the said decree of divorce. The petitioner suppressing the facts, approached this Court after seven months, with mala-fide intention of getting custody of the children without availing the alternative remedy available under law. This petition is not maintainable, since second respondent is the father and natural guardian of the two minor children and their custody was lawfully given under the decree of divorce, dated 11.01.2013. The petitioner has approached this Court by wrongfully informing that the children are in the unlawful detention of second respondent. The petitioner, on 20.06.2013, along with her mother, maternal grandmother and maternal uncle, along with four or five persons, alleged to be the members of Social Democratic Party of India (SDPI), came to second respondent's house with an intention to unlawfully take the minor children with them and since second respondent strongly protested,

they left the house. However, the children were shown to the petitioner as per her request. Anticipating further unlawful acts by them, second respondent lodged a complaint dated 04.07.2013 with the Commissioner of Police, Chennai on 05.07.2013 about the said incident and the said complaint is pending enquiry at the Maduravoyal Police Station. The petitioner suppressed the aforesaid incident that took place on 20.06.2013 in the residence of second respondent. The petitioner is having efficacious remedy u/s 9 of the Guardians and Wards Act, for custody of the children and hence, this HCP is not maintainable.

5. In support of his contentions, learned counsel for the second respondent placed reliance on a typed set of papers, which depicts the position that pursuant to an agreement for divorce, dated 11.01.2013, a decree of divorce came to be passed by the Government Khazi, of Karur District on 22.01.2013. It is useful to reproduce the following portion of the decree of divorce, dated: 22.01.2013:

It is further ordered, that the plaintiff, is the designated legal custodian and is responsible for the care and upbringing of children that were born issue of their marriage Zainab Ansari and Juveria Ansari. It is further ordered, that the plaintiff, to provide the expenses of the defendant and the two children during the separated period (6-Jan-2012 to 11-Jan-2013), the settlement amount of Seven hundred and fifty thousand Indian Rupees only (INR 750,000/-) on or before 24-Jan-2013. It is further ordered, both parties shall hereafter continue to live separately and neither shall annoy, molest, interfere with or harass each other in anyway or any manner either directly or indirectly. May Allah The Al-Mightily forgive the unrighteous behaviours of both sides and bestow them an enjoyable new life.

A letter of undertaking on non-judicial Stamp Paper undertaking to act in keeping with the terms of divorce, has been executed by the petitioner's father on 22.01.2013. A copy thereof also is enclosed in the typed set of papers. In support of the contentions on certain wrongful acts committed by the petitioner-party on 20.06.2013, copy of complaint, dated 04.07.2013 lodged with the Commissioner of Police, Chennai, is produced.

6. Learned counsel for the petitioner submitted that petitioner does not know Tamil and she had been threatened and coerced to sign the agreement for divorce on 11.01.2013. He further submitted that having required the relatives to rescue the minor daughters from the clutches of second respondent, petitioner had gone over to Dubai owing to certain predicaments. Since no action was taken, she lodged a complaint with first respondent Police on 22.07.2013. Having had no response, she has preferred the present HCP. The delay in moving the same is owing to genuine reasons. Learned counsel placed reliance on a judgment of the Apex Court in Gohar Begam Vs. Suggi alias Nazma Begam and Others, , wherein, as against the order of the High Court permitting custody of the minor children to the opposite party, the Apex Court had permitted custody of the child in the hands of the appellant, informing that though the appellant had a right under the Guardians and Wards Act to seek the custody of the child,

the same would not be justification for denying her the right of custody of the child u/s 491 Cr.P.C. (Section 491 Cr.P.C. of the old code dealt with power to issue directions of the nature of a habeas corpus).

7. Learned counsel for second respondent submitted that the custody of the children had been duly agreed upon and confirmed by the decree of divorce passed by the Government Khazi, Karur District on 11.01.2013. As the personal law as applicable to the parties had been availed of, it would not be open for the petitioner to move this Court by way of the present HCP. If at all the petitioner had any grievance against the decree of divorce passed by the Government Khazi, she would have to challenge the same and seek custody of the children only under the provisions of the Guardians and Wards Act.

8. We have considered the rival submissions. We find that no reasonable cause is shown for custody of the children in the hands of petitioner. They have been placed in the hands of second respondent/father/natural guardian under a decree of divorce granted by the Government Khazi, a person authorised to grant divorce under the personal law applicable in the instant case. It is to be noted that the petitioner has not disputed that such decree of divorce stood granted. She only contends that the same came to be granted upon deceiving her and under threat and coercion. The decision relied on by learned counsel for the petitioner is one wherein it was found that the appellant before the Apex Court was the mother of an illegitimate child. It was held that under Muslim Law, she was entitled to custody and in circumstance where the respondents before the Apex Court had absolutely no right, custody was ordered in favour of the mother. We do not find the decision applicable in the facts of the present case. For the aforesaid reasons, this petition shall stand dismissed. It shall be open for the petitioner to take recourse to such remedy as available to her in law. We record the submission of the learned counsel for second respondent that second respondent has no objection to the petitioner visiting the minor children. Without prejudice to the petitioner's rights to move appropriate forum for relief, we record that the petitioner accompanied by her mother, shall be entitled to visit the minor detenu-children from time to time.