
(2004) 07 MAD CK 0106

In the Madras High Court

Case No : Habeas Corpus Petition No. 701 of 2004

Asha Varghese

APPELLANT

Vs

Leelama Pailo and Others

RESPONDENT

Date of Decision : 21-07-2004

Acts Referred:

Citation : (2005) 1 CTC 536

Hon'ble Judges : V. Kanagaraj, J;S. Ashok Kumar, J

Bench : Division Bench

Advocate : K.G. Krishnaraj, for S. Shanthakumari, for the Appellant; K. Abudukumar Rajaratnam, Government Advocate (Crl. Side) for Respondent Nos. 4 to 6, for the Respondent

Judgement

V. Kanagaraj, J.—This Habeas Corpus Petition has been filed praying to direct the respondents 4, 5 and 6 herein to produce the body of the petitioner's minor female child Ashmin Elizabeth Biju, aged about 21/2 years old from the illegal custody and illegal detention by respondents 1 to 3 herein before this Court and to restore the custody of the child Ashmin Elizabeth Biju, to the petitioner.

2. Today, when the above petition came up before this Court, we are able to find from the records that notices have been served on all, excepting the 7th respondent herein, who is the husband of the petitioner, who is said to have been in abroad.

3. Today, not only the petitioner, but all the respondents, including the 7th respondent, appeared before this Court along with the child, the custody of which is the issue before us.

4. Prior to going into the merits of the case, it is always necessary to solve the legality of the problem, in which event, there would not be any necessity to go into the merit of the matter at all.

5. It is the law, that till the completion of the year of five of any child, the child

whether male or female must be with the custody of the mother and even thereafter, if the child is a female child, till such time, that the child attains puberty or the mental make up, so as to withstand and take care of herself without anybody's help, only then, the question as to with whom the child has to be left, that would also arise only between the father and mother of the child.

6. In such event, when the father and mother both are alive in the case in hand, the question of the other respondents, such as the paternal grandmother of the child, the brothers of the 7th respondent etc. do not come into picture at all.

7. Coming to the facts, this Court is able to assess on its interrogation with the parties, that some difference of opinion is still in existence in between the husband and wife, and on the husband's family side, they would like to take custody of the child with them. On the other hand, the wife, that is the mother of the child is very keen in getting the child and keep it along with her and in such event, as already explained, the position of law is in favour of the mother and even though, the father has got a priority regarding the custody of the children, from among the father and mother, still, considering the age of the child being hardly three, the child has to be nursed in many ways, particularly regarding the suckling babies and therefore, the law has been designed to the effect, that till the completion of fifth year of age, the child whether male or female must be with the mother and if it is a female child, even thereafter, till it attains puberty or the mental make up, that is required to have its existence of their own, it should be with the mother, which question shall be decided by the Court at the appropriate time. Now, because of the above clarification rendered, it is easy to arrive at the conclusion that the child in question in the above Habeas Corpus Petition, shall be left with only the mother, particularly, in view of the fact, that no other better or valid reasons being offered on the part of the respondents herein, this Court is of the view that the child should be handed over only with the mother for the up keep and maintenance of the same and hence, the same is ordered accordingly, besides handing over the child physically with the custody of the petitioner.

8. Any other difference of opinion or claim, if exists between the petitioner and the respondents, it shall be met with in accordance with the known sources of law in the appropriate forum.

In result, the above Habeas Corpus Petition is ordered in the above manner.