

(1968) 03 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2 of 1968

Bhagwati Bai

APPELLANT

Vs

Yadav Krishna Awadhiya and Others

RESPONDENT

Date of Decision : 22-03-1968

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1898 (CrPC) — Section 491

Citation : AIR 1969 MP 23 : (1969) CriLJ 204 : (1972) ILR (MP) 25 : (1968) JLJ 717 : (1968) 13 MPLJ 685 : (1968) MPLJ 685

Hon'ble Judges : Shiv Dayal, J; R.J. Bhawe, J

Bench : Division Bench

Advocate : S.C. Dutt, for the Appellant; P.R. Padhye, for the Respondent

Judgement

Shiv Dayal, J.

This is a petition u/s 491, Criminal Procedure Code, and Article 226 of the Constitution for issue of a writ in the nature of habeas corpus. It is alleged by the petitioner that she was married to Yadav Krishna, respondent 1, on 7 March 1964 according to Hindu rites. They have two children; Shyam aged about 2-1/2 years and Ramoo about 5 months. The husband is a lecturer in the Government Higher Secondary School, Dongargarh, district Durg. The parents of the petitioner reside at Jabalpur. Because of his ill-treatment, she came to Jabalpur for her first delivery. This was with the permission of her husband, but she wanted an assurance of good behaviour to be given to her, before she would return. The husband then instituted a suit for restitution of conjugal rights u/s 9 of the Hindu Marriage Act, in the Court of the District Judge, Rajanandgaon. This was in March 1966. But, when he came to Jabalpur in June 1966, there was conciliation in the presence of respectable persons. She then agreed to go and stay with him, provided he withdrew the suit. That was done. She went back and started living and cohabiting with him at Dongargarh.

She further alleges that he again started ill-treating and beating her and also

threatened to kill her. In the meanwhile, she again conceived and, to help her in her delivery, her mother was called from Jabalpur. Her father also went there to see her. On 25 October 1967, the younger child was delivered. On 3rd December 1967, the husband quarrelled with the petitioner and her parents and threw out the luggage of her parents and pushed her out of the house saying that he no more wanted her or any relations of her to live with him. She resisted but she was forcibly turned out. She wanted her children to accompany her but they were forcibly kept back by the husband.

In these circumstances, she alleges that the children are under illegal and unlawful detention of their father inasmuch as under the law she is entitled to their custody and that the welfare of the minor children lies in their staying with her.

Shrimati Kejabai (respondent 2) is the sister of Yadav Krishna; Sambaroo Ram (respondent 3) is his brother-in-law. Yadav Krishna has kept Ramoo, the younger child, with them and is under their care.

Yadav Krishna opposes this petition. In the return filed by him, he inter alia denies that he ever ill-treated the petitioner. He says that she being the only child of her parents, the latter want him to stay with them, but to this he does not agree. This seems to be the rift in the lute between him and the petitioner. He says that the children were left by the petitioner herself, and that they are being looked after very well. He denies that it will be in the interest of the children that they live with the petitioner. He says that Ramoo is not with respondent 2 or 3 but he has kept the Dutt (?) under the care of his paternal aunt at Raipur. Her name has not been disclosed.

When this petition came up for hearing, Shri Dutt for the petitioner and Shri Padhye for Yadav Krishna made a sincere and prolonged endeavour for reconciliation. It is remarkable that neither side has anything to say against the moral character of the other. It is quite clear that they are not carrying on well with each other, but the cause of this seems to be petty domestic quarrels. Although the present proceeding is not under the Hindu Marriage Act, or the Hindu Minority and Guardianship Act, it appeared that if the parties came to an amicable settlement, it would be in the interests of both the children and this petition would become infructuous. But, ultimately, learned counsel stated that the parties could not come to terms amicably.

The writ of habeas corpus ad subjiciendum, i.e., you have the body to submit or answer, is commonly known as the writ of habeas corpus. It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated, for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force

or restraint is being used against the minor by the respondent. In *Gohar Begam Vs. Suggi alias Nazma Begam and Others*,) where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued.

But it must be remembered that this prerogative writ is an extraordinary remedy and the writ is issued where, in the circumstances of the particular case, ordinary remedy provided by the law, is either not available or is ineffective or inadequate. Otherwise, a writ will not be issued; it will be open to the person aggrieved to seek the ordinary remedy. Thus the power of the High Court in granting the writ is qualified and has to be used in the exercise of judicious and sound discretion. For restoration of custody of a minor from a person, who according to the personal law, is not his legal or natural guardian, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be, and it is only in exceptional cases that the rights of the parties to the custody of the minor will be determined on a petition for habeas corpus. (See *M. Basavalingam v. M. Swarajyalakshmi*, AIR 1957 Andh Pra 704).

It cannot be said that an application u/s 491, Criminal Procedure Code by a guardian for custody of the minor cannot lie just because there is the ordinary remedy provided by the law. The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. The underlying principle is that the guardian's claim to the custody of the child is not a right in the nature of property but, indeed, it is a right in the nature of trust for the benefit of the minor. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary.

We shall now apply these principles to the present case. The petitioner is the mother of both the minor children, Shyam and Ramoo. Both of them are under five years of age. Section 6 of the Hindu Minority and Guardianship Act, 1956, enacts that the natural guardian of a Hindu minor boy is the father and after him, the mother. Then there is a proviso which reads thus:

". . . .provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

The language of the proviso makes it abundantly clear that although the guardian is the father, the custody shall be with the mother until the minor completes the age of five years.

Shyam, the elder child, is with his father. He cannot be called a stranger; after all, Shyam is his son. There is absolutely nothing to show that there is imminent

danger to the health or safety or morals of Shyam, while he is in the custody of Yadav Krishna. Likewise, there is nothing on the basis of which it can be said that it will not be in the interest of the minor to stay with his father. On the contrary, it appears to us that having regard to the welfare of this boy, it will be better that he stays with his father. This is the time that his education should begin. Yadav Krishna is a lecturer in a Government Higher Secondary School. He can look after the boy very well. Having regard to all these circumstances, issuance of habeas corpus must be refused in his case.

But the same situation does not obtain as regards Ramoo. He is a little babe of about five months. Considerations of his welfare require that he should be kept with the mother in preference to the father. It is true that the petitioner is also a teacher in a School, but, during her absence for a few hours every day when she goes to the School, she voluntarily parted with the custody of Ramoo by entrusting him to his paternal aunt, who does not reside at Dongargarh; she resides at Raipur, which is said to be about 100 miles away from Dongargarh. Ramoo is thus not under the immediate care and custody of Yadav Krishna. There is not the slightest doubt that the care of this younger child will be much better if he is kept with his mother.

Let us still hope that the petitioner and her husband will amicably settle their quarrels.

Accordingly, we direct that the respondents shall forthwith place Ramoo under the care and custody of the petitioner. This petition is dismissed as regards Shyam. Shri Dutt and Shri Padhye agree that the child Ramoo shall be handed over by Yadav Krishna (respondent No. 1) to the petitioner in the presence of the District Magistrate, Raipur, or, in his absence, in the presence of the City Magistrate, Raipur, on 2 April 1968. We direct that a warrant shall be issued accordingly. The warrant shall be served on respondent no. 1 to produce Ramoo before the District Magistrate or the City Magistrate, as directed above. Shri Padhye and Shri Dutt will also intimate the respective parties forthwith. There shall be no order for costs of this proceeding.