

(2009) 06 MAD CK 0003

In the Madras High Court

Case No : Habeas Corpus Petition No. 701 of 2009

K. Premalatha

APPELLANT

Vs

Kumarapandian, Indirarani, Sudhakar and State

RESPONDENT

Date of Decision : 30-06-2009

Acts Referred:

Citation : (2009) 06 MAD CK 0003

Hon'ble Judges : S.J. Mukhopadhaya, J;Raja Elango, J

Bench : Division Bench

Advocate : A.V. Arun, for the Appellant; R. John Sathyan, for R. 1 to R. 3 and V.R. Balasubramanian, Assistant Public Prosecutor For R. 4, for the Respondent

Judgement

Raja Elango, J.—The petitioner, who is the mother of the detenues, by name, Prem Kumar aged 14 years and Praveen Kumar aged 11

years has filed this habeas corpus petition for production of her minor children, who are illegally confined by the second and third respondents.

2. Compendiously and concisely, the relevant facts which are absolutely necessary and germane for the disposal of this petition would run thus:

(a) The petitioner married the first respondent, viz., Kumarapandian on 04.12.1994 as per Hindu rites and customs at Vellore; subsequent to the

marriage, they lived together in Vellore District; consequently, they went to Singapore; out of the wedlock, two sons were born, their respective

date of birth being 15.01.1996 and 10.07.1998. Further, due to some misunderstanding that arose between the petitioner and the first respondent,

the first respondent filed HMOP No. 56 of 2003 on the file of the learned Sub Judge, Vellore, seeking divorce, and at the intervention of the

elders, the same was withdrawn.

(b) Again by filing HMOP No. 60 of 2006, the first respondent obtained an ex parte decree of divorce and custody of the children on 02.11.2007, and the same was not intimated to the petitioner. Without informing the order obtained by the first respondent in his favour, he continued to live with the petitioner at Singapore. On 31.01.2009, the first respondent without informing the petitioner brought the children to India. Ever since from that date, the children were with the first respondent. Inasmuch as the first respondent has taken the custody of the children by a deceptive manner, the petitioner has approached this Court by way of Habeas Corpus Petition for restoration of the custody of the children.

3. The learned Counsel for the petitioner drawing the attention of this Court to the affidavit filed by the petitioner would submit that the first respondent with an ulterior motive to desert the petitioner has indulged in cruel activities; further he had illicit relationship with an Indonesian girl with whom he has been regularly talking over phone and sending SMS and only with an intention to marry her, he obtained ex parte decree of divorce. It is further submitted that the first respondent during the absence of the petitioner at home, broke open her bureau removed the passport and other documents of her children and arranged the flight for himself and the minor sons and to India. He further went to the extent of disturbing the petitioner's possession and enjoyment of the house at Choolai, Chennai. The children are admitted at Valliammal Residential School at Madras and the petitioner is prevented from meeting them and during summer vacation the second and respondents herein have detained them in a secret place.

4. Denying and refuting the allegations/averments made by the petitioner, the learned Counsel for the respondents 1 to 3 would submit that only to spoil the reputation of the first respondent, the petitioner has averred baseless and slanderous facts. He would further submit that the allegation that he obtained ex parte decree of divorce was not true, since notices were sent to the petitioner to the address at which she resided. Further the only intention of bringing the children from Singapore was to give them good education and proper care, since they were neglected and abused by the petitioner and they were deprived of love and affection from their mother, the petitioner herein. The petitioner has suppressed the fact that she is

not a Hindu by living and that she embraced Christianity and has been attending the prayers and spent the money on religious institutions in order to create a niche for herself in the society.

5. We are not inclined to state anything regarding the allegations made by the respective parties, inasmuch as the allegations are not a matter to be decided by this Court and the same is not in question before us.

6. The main points for consideration are as to:

(i) Whether the HCP against the husband by the petitioner herein is maintainable; and

(ii) Whether the custody of the children may be ordered in this petition.

7. The main ground alleged by the petitioner is that the first respondent without informing the fact of divorce continued to live with her. So the first

respondent intentionally with a view to kidnap the children from the lawful guardianship of the petitioner has taken away the children from

Singapore to India. Secondly, in order to make out a cause of action in India, he has taken the children from Singapore and after that he filed an

application in I.A. No. 402 of 2009 in O.S. No. 111 of 2009 for injunction restraining the first respondent from removing the children from the

School, which is not maintainable under law. The learned Counsel for the respondents 1 to 3 submitted that the father being the natural guardian,

his act could not be alleged as kidnapping. Further according to the first respondent, the petitioner as well as the children are sponsored by him at

Singapore.

8. The learned Counsel for the petitioner as well as the respondents relied on various judgments in support of their contention. The petitioner relies

on various decisions in connection with the fraudulent act of the first respondent in obtaining the custody of the children by way of forging the

documents in the Court. We are not inclined to delve deep into the manner in which the first respondent obtained an order. In any event, the facts

of the case disclose that after obtaining an order by the competent court, the order was not executed in accordance with law. The removal of the

children from Singapore to India clearly shows the intention of the respondent to make out a cause of action in India. On that basis he filed a

original suit O.S. No. 111 of 2009 before the District Munsif Court, Vellore.

9. The learned Counsel for the petitioner relied on the decision of the Hon''ble Apex Court reported in [Mrs. Elizabeth Dinshaw v. Arvand M.

Dinshaw and Anr.], wherein, after an order of divorce by the Court of United States of America, the right of visitation to the father of the child was

granted and using the same the father brought the children to India. The wife filed a petition before the Supreme Court for restoration of the child.

The same was allowed by the Supreme Court and the child was restored to the custody of the mother.

10. The respondent counsel relied on the Division Bench decision of this Court reported in 1993 (1) MLJ 517 CrI. [K.V. Bhaskaran v. P.O.

Shoba] and some other decisions.

11. A plain reading of the decisions cited supra indicate that maintainability of HCP in these type of cases depends upon the facts and

circumstances of each case. So there is no straight jacket formula regarding maintainability of HCP in connection with the question of custody of

the children.

12. Considering the rival submissions, we are of the opinion that in the present case it is an admitted fact that the children were in the custody of the

petitioner in Singapore and the first respondent by deceptive manner brought the children to India. Hence the HCP is maintainable.

13. From a perusal of the records and on consideration of the submissions made by the learned Counsel appearing on either side the following

facts arise for consideration in deciding the issue;

(i) The children were in the custody of the petitioner till 31.01.2009;

(ii) On enquiry, the fact of divorce by the first respondent was not informed to the petitioner;

(iii) The order of the Civil Court in HMOP No. 60 of 2006 was not given effect by adopting a legal procedure;

(iv) The children were brought to India by the first respondent by deceptive method. Considering the above facts, we are inclined to restore the

custody of the children to the petitioner. Accordingly, this Habeas Corpus Petition filed by the petitioner is allowed.

14. As far as the pendency of various cases in connection with the custody of the children are concerned, we are not expressing any opinion, but at

the same time the concerned Courts are at liberty to decide the issue on merits

without being influenced by any of the observations made in the present order.

15. The further prayer of the petitioner for return of the passport which was surrendered to the Registry as per the earlier order of this Court dated 02.06.2009 is allowed. The Registry is directed to return the same.