

(2015) 09 AHC CK 0050

In the Allahabad High Court

Case No : Habeas Corpus Writ Petition No. 47232 of 2015

Kavita

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 363, 366, 376, 420, 467

Citation : (2016) 92 ALLCC 22

Hon'ble Judges : B.K. Narayana, J;Vijay Lakshmi, J

Bench : Division Bench

Advocate : Sanjay Singh, for the Appellant

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner and learned AGA for the State.
2. This writ petition has been filed by the petitioner Smt. Kavita through her husband Kamal @ Pappu son of Ramesh alleging her illegal detention by the respondent No. 4 with a prayer to issue writ order or direction in the nature of habeas corpus directing the respondent Nos. 2 and 3 to produce the corpus of the petitioner (detenu) Smt. Kavita before this Court and set her at liberty.
3. The facts relevant for deciding this writ petition are that the petitioner Smt. Kavita, who claims herself to be major, had fallen in love with one Kamal @ Pappu and decided to solemnize marriage with him but since her parents were opposed to her marriage with Kamal @ Pappu, she left her parental home for the first time in the year 2012 with Kamal @ Pappu with regard to the aforesaid incident her father had lodged an FIR under Sections 363, 366 IPC at P.S. Patwai, District Rampur in which after her recovery her statement was recorded under Section 164 Cr.P.C.. but she did not support the prosecution case in her statement recorded under Section 164 Cr.P.C. and Kamal @ Pappu who was arrested on account of his involvement in the case aforesaid case and sent to jail

was granted bail by this Hon"ble Court and is currently facing trial for the aforesaid offences and the petitioner even in her evidence tendered in the aforesaid trial has not supported the prosecution case. The petitioner again left her parental home in the year 2014 and solemnized marriage with Kamal @ Pappu on 06.10.2014. Since after their marriage the petitioner and her husband were being harassed by the respondent No. 4 and his other relatives, the petitioner and her husband Kamal @ Pappu filed writ petition No. 57386 of 2014 before this Court with a prayer to issue a writ of mandamus commanding the respondents to restrain from interfering with the peaceful life of the petitioner on the allegations that they were adult and married. By the interim order passed in the aforesaid writ petition on 18.12.2014, the petitioner was sent to Naari Niketan by this Court after holding her to be minor. The aforesaid writ petition was dismissed as withdrawn by the petitioner by order dated 22.01.2015 and by the same order the petitioner was sent to Naari Niketan, Moradabad with a direction to be produced before the C.J.M., Moradabad who was required to pass an appropriate order for her stay in consultation with Child Welfare Committee, Moradabad, hereinafter referred to as CWC in some suitable place till she attained majority and thereafter to be allowed to go to the place of her choice. In pursuance of the order of this Court dated 22.01.2015 passed in civil misc. writ petition No. 57386 of 2014, and on the recommendation of the CWC Moradabad, the C.J.M., Moradabad passed an order on 03.02.2015 for sending her to Naari Niketan, Moradabad treating to her to be minor in view of the finding recorded in the interim order dated 18.10.2014 passed by this Court in civil misc. writ petition No. 57386 of 2014.

4. Immensely annoyed on account of the petitioner having eloped and solemnized marriage with Kamal @ Pappu against his wishes, the petitioner's father Mohan Lal lodged another first information report at P.S. Patwai, district Rampur on 19.12.2014 alleging therein that one Kamal @ Pappu, son of Ramesh had enticed away his minor daughter Kavita on 26.10.2014.

5. The aforesaid FIR was registered on 19.12.2014 as case crime No. 326 of 2014, under Sections 363, 366, 376, 420, 467, 468, 471 IPC and 3/4 POCSO Act at P.S. Patwai, District Rampur. After the petitioner was recovered by the Investigating Officer in the aforesaid case, she was subjected to medical examination for determination of her age. The report of the medical/radiological examination of the petitioner Kavita has been filed as Annexure-6 to the writ petition. Her statement under Section 164 Cr.P.C. was also recorded in which she totally denied the prosecution case and stated that she had left her parental home on her own accord and voluntarily solemnized marriage with the petitioner.

6. Learned counsel for the petitioner submitted that according to the petitioner's radiological examination report dated 22.12.2014 (Annexure-6), her age is above 18 years and hence the learned Judicial Magistrate committed a patent error of law in holding her to be minor by placing reliance on the finding recorded by this Court in the interim order dated 18.12.2014 passed in civil. misc. writ petition

No. 57386 of 2014 which was based upon the medical certificate of the petitioner of the year 2012 and in sending her to Nari Niketan after she refused to go with her father. He further submitted that the petitioner is neither an accused nor is wanted in any criminal case hence the Judicial Magistrate clearly exceeded his jurisdiction in sending her to Nari Niketan, although the law on the issue stands settled that even a minor cannot be sent to Nari Niketan against her wishes.

7. Per contra, learned A.G.A. and learned counsel for the respondent No. 4 submitted that the petitioner being a minor cannot be set at liberty and allowed to go with her husband merely on account of her having solemnized marriage with Kamal @ Pappu and her desire to go and live with him. They next submitted that the order of the Chief Judicial Magistrate pursuant to which the corpus was sent to Nari Niketan is a judicial order and hence the detention of the corpus in Nari Niketan cannot be said to be illegal. The learned Chief Judicial Magistrate rightly held the petitioner to be minor by placing reliance on the interim order of this Court dated 18.12.2014. They lastly submitted that the contention of the petitioner's counsel that the petitioner is major is wholly misconceived. Ever as per her date of birth recorded in the school leaving certificate dated 29.03.2012 issued by the Head Master, Prathmik Vidyalaya, Madarpur, District Rampur she is minor.

8. In reply learned counsel for the petitioner submitted that the petitioner has never studied in any school and the leaving certificate purported to have been issued by the Head Master, Prathmik Vidyalaya, Madarpur, Rampur has been fabricated by the respondent No. 4 immediately after the petitioner had left her parental home for the first time in the year 2012 with the oblique motive of proving that the petitioner was minor before the police as well as the courts of law.

9. In compliance of the order of this Court dated 21.8.2015 the detinue Kavita was produced before this Court. She was identified by her counsel as well her parents who are also present in Court.

10. On being questioned by the Court she reiterated the same facts which she had stated in her statement recorded under Section 164 Cr.P.C. She flatly refused to go with her parents and said that in case she was forced to go with them they would commit her murder.

11. Upon being confronted with the School Leaving Certificate (Annexure SA-1) she stated that neither she had ever studied in the said primary school nor her date of birth recorded in the aforesaid certificate is correct. She further stated that this school leaving certificate is a forged and fabricated document.

12. We have carefully considered the submissions made by learned counsel for the parties, the materials brought on record as well as the statement made before this Court by the detinue Smt. Kavita.

13. The issue whether the victim/detinue who is a minor, can be sent to Nari

Niketan against her wish, is no longer res integra and has been conclusively settled by a catena of decisions of this Court. In the case of Mrs. Kalyani Chaudhari Vs. The State of U.P. and Others, (1978) CriLJ 1003 , a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

14. In the case of Pushpa Devi Versus State of U.P. and others reported in 1994 HVVD (All) C.R. Vol. II page 259 a Division Bench of this Court has enunciated the same principle as hereunder:

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.

We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.

Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I.P.C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors."

15. In the case of Smt. Raj Kumari Vs. Superintendent, Women Protection House and Others, (1997) 2 AWC 720 : (1998) CriLJ 654 another Division Bench of this Court has laid down the following dictum:

"In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the

instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports, i. e. of the Chief Medical Officer and L.L.R.M., College Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed."

16. Thus in view of the above, it is clear that it is the consistent view of this Court is that a minor cannot be detained in a protective home against her wishes.

17. Now coming to the objection canvassed by learned A.G.A. before this Court that the detention of the petitioner cannot be said to be illegal as she has been sent to Nari Niketan in pursuance of a judicial order, we hold that the objection raised by learned A.G.A. is without any merit in view of the principle laid down by the Division Bench of this Court in the case of Pushpa Devi (supra) holding that "a victim may at best be a witness and there is no law at least now has been quoted before us where under the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place".

18. Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order, her detention cannot be labelled as "legal" rendering this Habeas Corpus writ petition liable to be dismissed as not maintainable.

19. We next proceed to examine the issue whether the detenue is a minor or major. The petitioner's counsel in support of his submission that the petitioner is major has relied upon her radiological examination report (Annexure-6 to the petition) in which her age has been mentioned above 18 years and submitted that the detenue is major.

20. Refuting the submission of learned counsel for the petitioner in this regard, the learned A.G.A. and learned counsel for the respondent No. 4 drew our attention to the school leaving certificate dated 29.03.2012 of the petitioner issued by the Head Master of Primary School, Madarpur in which the date of birth of the detenue is recorded as 05.04.1998 and submitted that the petitioner is minor.

21. Learned counsel for the respondents further submitted that the petitioner was held to be minor by Hon'ble Single Judge of this Court in the interim order passed in civil misc. writ petition No. 57386 of 2014 and hence there is absolutely no iota of any doubt that the petitioner is minor.

22. The genuineness of the leaving certificate has been seriously challenged by learned counsel for the petitioner as well as the detenue herself. The detenue in her statement recorded before this Court has stated that she had never studied in Primary School, Madarpur and her date of birth recorded therein is absolutely

incorrect.

23. A perusal of the leaving certificate shows that the same was issued on 29.03.2012 i.e. after the petitioner had left her parental home for the first time on her own accord with Kamal @ Pappu with whom she had later solemnized marriage. In view of the above, the leaving certificate which is neither High School certificate nor equivalent to High School examination and which has been issued after the controversy arose clearly appears to be fabricated and no reliance can be placed on the same in view of the detenue's age determined by the C.M.O. on the basis of her radiological examination and her own statement made before this Court. Moreover. Even assuming for the sake of argument that the leaving certificate is genuine, there is no proof that the Primary School, Madarpur was the first school attended by the detenue.

24. Now coming to the finding recorded by this Court by learned Single Judge in the interim order dated 18.12.2014 passed in civil misc. writ petition No. 57386 of 2014, it appears that the learned Single Judge while holding her to be minor had placed reliance upon the order of the Chief Judicial Magistrate, Rampur dated 19.04.2012 who had held her to be 15 years of age on the basis of her medical examination report. Thus even if we accept that the age of the petitioner held by the C.J.M., Rampur in his order dated 19.04.2012 to be correct, we have no hesitation in holding that today the petitioner is major, and this fact stands further corroborated from her radiological examination report dated 22.12.2014 according to which her age was above 18 years.

25. Under identical circumstances a Division Bench of Lucknow Bench of this Court in Habeas Corpus No. 146 of 2015 (Smt. Preeti Nishad v. State of U.P. and others) decided on 5.6.2015 has held as under:

The petitioner is neither an accused nor an offender of law. She is simply a citizen of this country who has done no wrong. She is major. The C.M.O. concerned has given her age to be around 20 years. This is based on medical examination and x-ray report. So far the certificate submitted by the father is concerned, it appears to be fabricated. Detenue has clearly mentioned that she has never studied in the school from where the age certificate has been obtained. It is not a matriculation certificate. It is a lower class certificate issued recently after the controversy arose. It cannot be trusted compared to the C.M.O. report and her own version before the Court.

26. In view of the foregoing discussion we have no hesitation in holding that the age of the petitioner determined by the C.M.O. on the basis of her radiological examination is more trustworthy than her age according to her date of birth recorded in the leaving certificate which appears to be a fabricated document and unworthy of credence and that the petitioner is major. Since the petitioner is major and not an accused in any case she cannot be detained in Nari Niketan against her wishes.

27. For the aforesaid reasons, this habeas corpus petition succeeds and is

allowed. The corpus, Smt. Kavita is set at liberty forthwith.