
(1956) 08 AP CK 0010
In the Andhra Pradesh High Court
Case No : Writ Petn No. 509 of 1956

Makutam Basavaligain

APPELLANT

Vs

Makautam Swarajyalakshmi and Others

RESPONDENT

Date of Decision : 06-08-1956

Acts Referred:

Constitution of India, 1950 — Article 226, 228
Criminal Procedure Code, 1898 (CrPC) — Section 491
Guardians and Wards Act, 1890 — Section 25

Citation : (1956) 08 AP CK 0010

Hon'ble Judges : Satyanaratana Raju, J;Chandra Reddy, J

Bench : Division Bench

Advocate : T. Dhanurbhanudu, for the Appellant; P. Rnmachandra Rao and Thammaiah, for the Respondent

Judgement

Satyanaratana Raju, J.—This application was filed under Article 228 of the Constitution to issue an order direction or writ Parti plarly one in the nature of habeas corpus to the 2nd and 3rd Respondents herein directing him to gjoduce the baby, son of the Petitioner, before this ourt immediately and then restore it to his custody Of.

2. The allegations in the affidavit in support of this petition are that the Petitioner married the first Respondent who is the illegitimate daughter of the 3rd Respondent by his concubine the second Respondent that the marriage took place on the 4th of April, 1953, that ever since the marriage the first Respondent, the Petitioner's wife, has been going away off and on from his house to her parents" house without obtaining his consent and much against his wishes at the instigation of the 2nd and 3rd Respondents, that she has been slighting him and has also been disobedient, that her behavior is not conducive to good morals and that in the last week of May when he had an attack of small-pox the first Respondent went away to her parents" house with the child in utter disregard of the Petitioner's wishes and without caring for his health and without attending on him.

3. These allegations are denied in the counter-affidavit. It is alleged in the counter-affidavit that this is a mala fide application, that the Petitioner was harassing his wife with a view to extract as much money as possible from her parents and that having failed in his attempts to get as much money as possible from the parents of the girl he has conceived the idea of taking out this application for the custody of the child. It is also added that Respondents 2 and 3 are wife and husband and the allegation to the contrary is a mischievous one. .

4. under Article 226 of the Constitution, the Plight Courts are invested with power lo issue the common law writ of habeas corpus in England and it is necessary to invoke the jurisdiction of a High Court to obtain direction of the nature of habeas corpus. But the powers conferred by this Article of the Constitution in regard lo the issue of writs of the nature of habeas Corpus are exercised for the purposes enumerated in Section 491,Code of Criminal Procedure No mally, the remedy indicated in Section 491, Code of Criminal Procedure is for a person deprived of his liberty.. If a person is detained without cause and has a right to be delivered, such a writ is granted to such a person. It extends its influence to remove every unlawful restraint on personal freedom in private life. It may in some circumstances be resorted to in order to obtain the custody of children from persons who arc illegally or unauthorized holding them. But, it is only in exceptional cases that the right of parties to the custody of children is determined in a petition under either of the two provisions of law. Ordinarily, this jurisdiction should not be invoked to decide disputes as to who should it the guardian of a child. They are properly adjudicated upon in an application under the Guardians and Wards Act as that is the ordinary remedy.

5. That apart even on the merits, we do not think that the Petitioner is entitled to have the custody of the child. The provisions of Section 25 of the Guardians and Wards Act govern this case. That section enacts:

25 (1). If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the (Oct.) 1957 Andh. Pra. D.P./45 ward to return to the custody of the guardian may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

6. It is clear from this section that the paramount consideration in the decision of the question arising u/s 25 of the Guardians and Wards Act is the welfare of the child. It is true that a father is the legal guardian of the child under Hindu Law, but in deciding whether a child should be entrusted to the care of a particular person, it is not so much the rights of the individuals that should be taken into the consideration as the interest of the minor child.

It is contended by Mr. Dhanurbhanudu that under Hindu. Law the father being the legal guardian, tho considerations of welfare are irrelevant and a father could insist upon having the child delivered to him as it is his duty to protect the child. In support of this proposition, reliance is placed on a judgment of a Bench of the

Madras High Court in (Kode) Atchayya Vs. Kosaraju Narahari, There, a father applied u/s 25 of the Guardians and Wards Act for the custody of the child who had lost her mother a short time before. After the mother's death, the child was being brought up by the maternal grand-parents.

The application was opposed by the maternal grand-parents on the grounds that the father had married a second wife, that he had ill-treated the mother of the child during her lifetime, and that the application for the custody was filed with a view to avoid the filing of a suit for partition. The learned Judges point out that the reasons cited in support of the opposition were not valid for refusing the custody of the child to the father. The following passage furnished the grounds for the decision of the learned Judges:

It therefore follows that when the guardian of the person of a ward applied for the custody of the Ward he is only asking the Court to help him to discharge the duty cast on him by law, with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made. This onus according to the authorities is especially heavy when the guardian is the father of the child who as pointed out by their Lordships of the Privy Council in *Besant's case Annie Besant v. Narayanaiah*, ILR 38 Mad 807 : AIR 1914 PC 41, is both according to Hindu Law and English law the natural guardian of his children during their minorities.

7. It is manifest that the learned Judges were not laying down any proposition different from the accepted notions which have been established by long chain of authorities that the supreme consideration in deciding the question of the custody of the child is its welfare. That passage shows that it may be assumed that the parents who are charged with the duty of protecting the child, look after the interests of the child much better than any one else and if a Court should come to the conclusion that It would be detrimental to the interests of the child "4(it is restored to the father, then the Court will certainly .direct that the child be in the custody of a. person who can look after the interests of the child properly. We have seen the child. He is less than -two years old.

We are also convinced that the child will be looked after better by the mother and her parents than the Petitioner who is a student and who has to attend the college and spend most of his time in his studies. He cannot therefore be expected to devote as much time as the mother who would be as much interested in the welfare of the child as, if not more than, the Petitioner himself. In the circumstances, we feel that there will be no justification to direct the handing over of the child to the Petitioner.

8. In the result, the petition is dismissed with costs which are fixed at Rs. 100.