
(2015) 09 AHC CK 0051

In the Allahabad High Court

Case No : Habeas Corpus Writ Petition No. 51294 of 2015

Mala (Corpus) and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 164, 482

Penal Code, 1860 (IPC) — Section 363, 366

Citation : (2015) 9 ADJ 737 : (2015) 113 ALR 493

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

Bench : Division Bench

Advocate : Anand Priya Singh, for the Appellant

Final Decision : Allowed

Judgement

1. In view of the office report dated 21.9.2015 the service on the respondent No. 4 is deemed to be sufficient. None has appeared on behalf of respondent No. 4.

2. This Habeas Corpus Writ Petition has been filed by the petitioners with the prayer to issue a writ of habeas corpus directing the respondent No. 2 to produce the corpus of petitioner No. 1, Smt. Mala, before this court and set her at liberty after recording her statement. A further prayer has also been made to quash the order dated 17.6.2014 passed by the Judicial Magistrate/Civil Judge (J.D.), Mau, in Criminal Case No. 295 of 2013, under section 363, 366 I.P.C. P.S. Dohrighat, District Mau, as well the order dated 25.4.2005 passed by the Additional Sessions Judge, Court No. 3, Mau, in S.T. No. 5 of 2014 by which the application moved by the petitioner No. 2 before him for releasing the petitioner No. 1 was rejected by him.

3. The brief facts of the case are that on the basis of an FIR lodged by respondent No. 4 Case Crime No. 295 of 2013 was registered under sections 363, 366 I.P.C. at P.S. Dohrighat, District Mau, against petitioner No. 2. As per the FIR allegations the petitioner No. 2 had enticed away the minor daughter of

respondent No. 4, Mala aged about 14 years on the promise of solemnizing marriage with her. After the petitioner No. 1, Mala, was recovered by the police she was subjected to medical examination for determination of her age and her statement under section 164 Cr.P.C. was also recorded. Her medical examination report has been brought on record as Annexure No. 3 whereas her statement recorded under section 164 Cr.P.C. has been filed as Annexure No. 4 to the petition. On the application moved by the I.O. before the Judicial Magistrate/Civil Judge (J.D.), Mau, for deciding the case of interim custody of petitioner No. 1 an order was passed by him on 17.6.2014 for sending her to Nari Niketan, Varanasi, holding her to be minor on the basis of her date of birth recorded in the Transfer Certificate issued by the Headmaster of Primary School, Parikhapur, District Mau, (Annexure No. 7) after she refused to go to her parent's home.

4. It appears that during pendency of the trial of the petitioner No. 2 in S.T. No. 5 of 2014 arising out of Case Crime No. 295 of 2013 also the petitioner No. 2 had filed an application for releasing the petitioner No. 1, Smt. Mala, which was rejected by the Additional Sessions Judge, Court No. 3, Mau, vide his order dated 25.4.2015, which was challenged by the petitioner No. 2 before this court in Application U/s 482 No. 15987 of 2015. The aforesaid application was dismissed by this court by order dated 27.8.2015 (Annexure No. 9) with the liberty to the petitioner to either file a revision against the order of the Magistrate dated 17.6.2014 or to seek such other appropriate legal remedies for which the petitioners may be advised.

5. It has been submitted by learned counsel for the petitioners that after the prosecutrix Smt. Mala was recovered she was subjected to medical examination and her statement under section 164 Cr.P.C. was also recorded. As per the medical opinion the age of the prosecutrix Mala was above 18 years and she in her statement recorded under section 164 Cr.P.C. had denied the prosecution case and had stated that she had left her parental home on her own accord and solemnized marriage with petitioner No. 2 voluntarily. She further stated that the petitioner No. 2 had neither enticed her away nor kidnapped her.

6. Learned counsel for the petitioners has further submitted that since as per the medical report of the petitioner No. 1 dated 10.6.2014 (Annexure No. 7) she is major the Judicial Magistrate, Mau, committed a patent error of law in sending her to Nari Niketan instead of setting her at liberty. He further submitted that the date of birth of petitioner No. 1 recorded in the Transfer Certificate issued by the Headmaster of Primary School, Parikhapur, Mau, is incorrect, as this is not the first school attended by the petitioner No. 1 and hence detention of the petitioner No. 1, who is legally wedded wife of petitioner No. 2, in Nari Niketan is per-se illegal.

7. Per contra learned AGA has supported the impugned order and submitted that the impugned order dated 17.6.2014 passed by Judicial Magistrate, Mau, is revisable and hence this writ petition is liable to be dismissed on the ground of alternative remedy. He next submitted that the petitioner No. 1 having been sent

to Nari Niketan in pursuance of an order passed by a competent authority her detention cannot be said to be illegal and hence no writ of Habeas Corpus can be issued in this case. He lastly submitted that the date of birth of petitioner No. 1 recorded in the Transfer Certificate is conclusive proof of her age and the Judicial Magistrate did not commit any error in placing reliance on the transfer Certificate in holding her to be minor and sending her to Nari Niketan after she refused to go with her parents.

8. In compliance of the order of this court dated 9.9.2015 the petitioner No. 1, Smt. Mala, was produced before the court today. Upon being questioned by the court she stated that her father, respondent No. 4, had lodged the impugned FIR against the petitioner No. 2 after getting immensely annoyed with her on account of her having solemnized marriage with petitioner No. 2 against his wishes. The allegations made in the FIR are totally false and incorrect including the allegation regarding her age showing her to be a minor whereas the correct fact is that she is aged about 21 years. She further stated that she was neither enticed away nor kidnapped by the petitioner No. 2. She further stated that the Primary School Pirkhapur, Mau, was not the first school attended by her and her date of birth recorded in Transfer Certificate issued by the Headmaster of the aforesaid school as 10.7.1999 is incorrect. She further stated that the reason, which compelled her to leave her parental home, was that her father was forcing her to marry to a widower having two children. She has solemnized marriage with petitioner No. 2 voluntarily after leaving her father's house on her own accord and wants to live with her husband. She flatly refused to go back to her parental home stating threat to her life at the hands of her parents as the reason.

9. 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. Mala.

10. The issue whether a minor, can be sent to Nari Niketan against her wish, is no longer res integra and stands 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."

11. 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"

12. 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."

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

14. Now we take up the objection raised by learned A.G.A. against the maintainability of this habeas corpus writ petition.

15. The first objection raised by learned A.G.A. that the order pursuant to which

petitioner No. 1/detenué has been sent to Nari Niketan, is an order passed by the Judicial Magistrate, Mau, and since the said order is revisable, this writ petition should be dismissed on the ground of alternative remedy, we are afraid, the same has no legs to stand. Even if the impugned order is revisable, the same will not render this writ petition liable to be dismissed on the ground of alternative remedy.

16. While considering the same question, a Division Bench of this Court in Habeas Corpus No. 146 of 2015; Smt. Preeti Nishad through her Husband, Mahendra Kumar Versus State of U.P. has held as hereunder:

"The main objection of Sri S.N. Tilhari, learned A.G.A. that the petitioner should be asked to file revision at this stage will be defeating the spirit of Article 21 of the Constitution of India. 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. Detenué 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.

She has made statement before this Court that she does not want to live in any Nari Niketan or Sudhar Griha. She does not even want to live with his father. Somehow due to incorrect judicial order she is languishing in Nari Niketan for the last seven months. It will be a travesty of justice if this Court dismisses this petition on any alternative remedy. The law on the subject is very clear. The Court cannot shut its eyes and relegate a citizen to further harassment and illegal detention. Neither the S.D.M. nor the A.D.J. had any jurisdiction to send a lady to a protective home without her consent. The respective orders passed by them are set aside."

17. Now coming to the second objection canvassed by learned A.G.A. before this Court that the detention of the petitioner No. 1 cannot be said to be illegal as she has been sent to Nari Niketan in pursuance of an order passed by the Judicial Magistrate, Mau, we hold that the second objection raised by learned A.G.A. is also without any merit in view of the principle laid down by the a Division Bench of this Court in the case of Pushpa Devi (supra) 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 No. 1 has been sent to Nari Niketan pursuant to an order passed by the Judicial Magistrate, Mau, which per-se appears to be without jurisdiction, her detention cannot be labeled as "legal" rendering this Habeas Corpus writ petition liable to be dismissed as not

maintainable.

19. We now proceed to examine the third objection raised by learned A.G.A. before this Court that the detenue being a minor cannot be set at liberty and allowed to go with her husband merely on account of her having solemnized marriage with him. The detenue-petitioner No. 1 as per her date of birth recorded in her Transfer certificate, is at present aged about sixteen years two months. There is nothing on record showing that the mother or the father of the corpus had made any application claiming her custody before the learned Magistrate. There is also no dispute that the petitioner No. 1 has solemnized marriage with petitioner No. 2, Gautam Chauhan, and they were living as husband and wife till the petitioner No. 1 was snatched away from her husband's custody and sent to Nari Niketan. A Division Bench of this Court in the case of Sonu Paswan Versus State of U.P. and another reported in 2013 (31) LCD 1107 has held that "a child marriage will be voidable at the instance of the minor. Otherwise, the marriage is not void ipso facto. In this view also the Magistrate does not have any right to snatch the custody of the detenue from the husband and place her in a protective home."

20. It is not the case of the respondents that the petitioner No. 1 has instituted any suit for her marriage with petitioner No. 2 Gautam Chauhan being declared void on the ground of the same being child marriage. The detenue in her statement recorded under Section 164 Cr.P.C. as well as in her statement recorded before this Court, has stuck to her stand that she is major and she had left her home on her own accord and solemnized marriage with petitioner No. 2, Gautam Chauhan, on her own sweet will without any pressure or compulsion.

21. She in her statement made before this court has categorically stated that her date of birth recorded in the Transfer Certificate as 10.7.1999 is incorrect and that Primary School Pirkhapur, Mau, was not the first school attended by her while she is more than 18 years of age as per her medical report.

22. Thus the petitioner No. 1, who is sixteen years old as per the Transfer certificate, and more than eighteen years as per her medical examination report, we hold her to be major accepting her age as per medical opinion to be correct, and as she understands her well being, her detention in Nari Niketan against her wishes, is per se undesirable and the order dated 17.6.2014 passed by the Judicial Magistrate, Mau, directing her detention in Nari Niketan without specifying the period of detention is not sustainable. The Judicial Magistrate, Mau, did not have any right to snatch the custody of the detenue from her husband and place her in a protective home. The detenue/petitioner No. 1 is not an accused of the offences under Section 363 and 366 IPC. She is only a victim. A victim, as held by the Division Bench of this Court in the case of Pushpa Devi (supra), may at best be a witness and there is no law where under the Court may direct detention of a witness.

23. In view of the foregoing discussion, we have no hesitation in holding that the

order dated 17.6.2014 passed by the Judicial Magistrate, Mau, directing her detention in Nari Niketan is not sustainable at all and the same is accordingly quashed.

24. For the aforesaid reasons, this habeas corpus petition succeeds and is allowed. The corpus, Smt. Mala is set at liberty forthwith and according to her wishes she is allowed to go with her husband petitioner No. 2, Gautam Chauhan, who is also present in Court.