

(1933) 09 AHC CK 0027
In the Allahabad High Court

Musammat Haydari Begum

APPELLANT

Vs

Syed Jawad Ali Shah

RESPONDENT

Date of Decision : 29-09-1933

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 491

Citation : 147 Ind. Cas. 820

Hon'ble Judges : King, J;Collister, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. This -is an application u/s 491 of the Code of Criminal Procedure. The applicant, Musammat Haidari Begum, prays that, on the grounds stated in her affidavit, this Court may be pleased to pass an order directing the opposite party (namely S. Jawad Ali Shah, the applicant's husband) to produce before the court the minor, Section Mazhar Ali Shah, at an early date and that thereupon the child may be delivered to the applicant. For the purpose of disposing of this application we need only state the salient facts very briefly. Syed Jawad Ali Shah was married in 1928 to the applicant. They had a son, Section Mazhar Ali Shah, whose age is now about 4f years. In July, 1933, the applicant was living with her husband and the child at Gorakhpur. On July 30, she left Gorakhpur for Lucknow in order to attend a ceremony at her parents" house. She left Gorakhpur by the night train. On her husband"s advice she left the child with her husband, to avoid the risks of a night journey on the understanding that her husband would follow her with the child next day. Her husband did not follow her, but sent her a registered letter dated August 2, 1933, stating that he had divorced her. The applicant served a notice upon her husband demanding the custody of the child, but her husband refused to surrender the child, claiming that he himself is entitled to his custody: hence the applicant made an application to the High Court u/s 491 of the Code of Criminal Procedure on the 20th of this month That application was heard by a learned single Judge, Mr. Justice Bennet, who rejected it on certain grounds which we need not set forth. The applicant then made a

second application, on the very same day, namely, the present application to the same effect and with the same object, to one of us, praying for the very same relief which had been refused by Mr. Justice Bennet. As the questions of law and procedure raised by the second application seemed to be of some difficulty and importance, it was ordered that the application should be heard by a Bench of two Judges.

2. As this second application has been presented ex parte we have not had the benefit of hearing any arguments on behalf of the opposite party or of the Crown.

3. The first question to be decided is whether this second application is maintainable, in view of the fact that a previous application to the same effect and with the same object has been rejected by a learned single Judge of this Court.

4. Sir Tej Bahadur Sapru, for the applicant, has relied strongly upon the Common Law practice, relating to applications for a writ of habeas corpus, which is in force in the courts of England and has been held in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1928) A.C. 459 : 97 L.J.P.C. 97 : 139 L.T. 527 : 72 S.J. 452 : 44 T.L.R. 632, to apply also to the Supreme Court of Nigeria. The law laid down in this ruling and in certain other rulings on the same subject is stated as follows:

The applicant (for a writ of habeas corpus) has a right to apply successively to every court competent to issue a writ of habeas corpus and each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even though the grounds urged are exactly the same. Thus, each Judge of the High Court of Justice has jurisdiction to entertain an application for a writ in term time or vacation and he is bound to hear and determine the application on its merits, notwithstanding that some, other Judge has already refused a similar application "Halsbury's" Laws of England 2nd Edition, Vol. IX, para 1239)

5. The question then arises, whether this practice should be followed in the High Court of Allahabad, in the case of applications u/s 491 of the Code of Criminal Procedure. We think it is clear that the rulings upon which the practice is founded have no direct application to proceedings u/s 491 in this Court. The rulings lay down the law relating to applications for writs of habeas corpus in countries where the common law of England is in force. In this Province the common law of England is not in force and this High Court has not the common law right of issuing a writ of habeas corpus. It only has the power conferred upon it by statute, of making "directions of the nature of a habeas corpus." Sir Tej Bahadur Sapru has not argued that the common law of England is in force in this Province, but he argues that if there is no prohibition imposed by statute, or by any rule having the force of law, then the common law practice relating to writs of habeas corpus should be followed in the analogous proceedings u/s 491 of the Code, as being a salutary and reasonable practice. The general argument seems

to be that as the powers to be exercised are similar, so the procedure to be followed should also be similar.

6. Section 491 of the Code of Criminal Procedure, 1898, did not originally confer any powers upon the High Court at Allahabad. It only conferred powers on the High Courts in Presidency towns to, make directions of the nature of a habeas corpus within the limits of their ordinary original civil jurisdiction. In the year 1923 the Code was amended and by the amendment all the High Courts in India were given power to take action u/s 491, within the limits of their appellate criminal jurisdiction. It seems clear, therefore, that the power which we are now being asked to exercise was conferred upon this Court by statute for the first time in 1923. It is a power which was conferred by statute and not merely regulated by statute. In such circumstances we do not think that the rules of common law which govern the procedure relating to an application for a writ of habeas corpus would necessarily or by implication be considered applicable to the exercise of the statutory power conferred upon us u/s 491. Prima facie an application for the exercise of powers conferred u/s 491 should be regulated by the procedure governing an application for the exercise of powers conferred under any other section of the Code, e.g. an application for bail.

7. It is argued that there is no prohibition against making successive identical applications u/s 491 either in any statute or in any rule regulating the procedure in cases under that section. Section 491 empowers High Courts to frame rules to regulate the procedure in cases under that section. We are informed that no rules have been framed by this High Court for regulating the procedure u/s 491. There appears, therefore, to be no special legal prohibition against the presentation of successive identical applications praying for a direction u/s 491. But the very fact that High Courts have expressly been empowered to make rules regulating the procedure under that section shows, in our opinion, that the legislature never contemplated the applicability of the common law rules governing applications for writs of habeas corpus. Although there are no special rules regulating the procedure u/s 491, there is, however, a general rule made by this High Court in exercise of the powers conferred by Parliament, Letters Patent and Acts of the Indian Legislature, which appears to be decisive of the point in issue. Rule 8, Chapter I of these Rules of Court runs as follows:

No application to the same effect or with the same object as a previous application upon which a Judge has passed any order, other than an order of reference to another Judge or judges, shall, except by way of appeal, be presented to any other Judge or Judges on behalf of any person on whose behalf alone or with others such previous application was presented.

8. As this rule relates to applications in general it would prima facie relate to an application u/s 491 of the Code of Criminal Procedure. It is argued for the applicant that this rule cannot apply to applications made u/s 491, because the rule was made long before 1923, when power to take action u/s 491, was for the first time conferred upon this High Court. It is true that when Rule 8 was framed

it could not have been contemplated that it would apply to applications made u/s 491. But Section 491 empowered the court to frame special rules governing the procedure under that section and as this High Court has not made any special rules governing the procedure u/s 491, we can only infer that no special rules were thought necessary and that Rule 8, which governs applications in general, was considered fitting to govern applications u/s 491 also. In any case the language of Rule 8 is undoubtedly wide enough to include applications u/s 491, and we consider ourselves bound to give effect to it unless and until this High Court thinks fit to make special rules expressly permitting the presentation of successive identical applications for a direction u/s 491 after previous applications to the same effect and with the same object have been rejected.

9. Even if we were at liberty to disregard Rule 8 of the Rules of Court, on the ground that it was never intended to apply to applications made u/s 491, we should hesitate to adopt the rule of common law relating to writs of habeas corpus, permitting successive identical applications, as being a rule so obviously reasonable and desirable that it ought to be extended to the exercise of statutory powers conferred by Section 491. To adopt such a rule would amount to making a very striking exception to Rule 8 which governs the procedure relating to all other kinds of applications, and which is merely an application of the salutary principle of *res judicata*. A single Judge of this Court has authority to grant or to reject an application u/s 491 and his order is an order of the High Court. If he rejects it and another single Judge, upon the same facts, comes to a different conclusion and grants the application, we should then have two contradictory and inconsistent orders of the same High Court. If on the other hand each of the eleven Judges successively and independently rejects the application, then much public time and money would have been wasted. Procedure leading to such consequences does not seem so unquestionably reasonable and desirable that we should feel inclined to adopt it as a special rule of procedure for cases u/s 491. Although the High Courts in India are empowered to make rules governing the procedure in cases u/s 491, and although it is, therefore, apparently open to them to make special rules permitting successive identical applications, it has not been shown to us that any High Court in India has made any such rule. Certainly this High Court has not made any such rule, and in the absence of such special rule we hold that we are bound to give effect to the general rule (Rule 8, Chapter I) regarding applications.

10. Under this rule the presentation of this second application, to the same effect and with the same object as the previous application which has been rejected by Mr. Justice Bennet, is expressly prohibited.

11. We hold, therefore, that this second application is not maintainable and we reject it.