

(1961) 10 MAD CK 0052

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 1594 of 1961

P. Ramakrishna Sastry

APPELLANT

Vs

C.T.S. Raganayakulu and Another

RESPONDENT

Date of Decision : 12-10-1961

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Criminal Procedure Code, 1898 (CrPC) — Section 100, 369, 491, 552

Citation : AIR 1962 Mad 354 : (1962) ILR (Mad) 674 : (1962) 75 LW 260

Hon'ble Judges : Srjnivasan, J; Jagadisan, J

Bench : Division Bench

Judgement

Jagadisan, J.

(1) The petitioner, P. Ramakrishna Sastri, prays for the issue of a writ in the nature of habeas corpus for the rescue and release of his daughter, Kumari Girija Sastri, alleged, to be a minor, from the improper detention and wrongful custody of her by the respondents and for the restoration of her custody to him. The petitioner avers that his daughter was living with him at Madras, and that on 12-4-1961 taking advantage of his absence from town at Masulipatam, the respondents kidnapped her from his lawful custody, and that she is now leading a shameful life having illicit intimacy with the first respondent and living a life of prostitution for his benefit and on his compulsion,. The respondents are not in any way related to the. petitioner or his daughter. The first respondent is described by the petitioner in, his affidavit in support of the application as an "unemployed vagrant" and the second respondent is stated to be "a make up man" employed in the motion picture industry. The petitioner's story, if true, is indeed a borrowing tale sufficient to cause any parent great mental anguish and pain.

(2) The petitioner filed in this court Crl. M. P. No 736 of 1961 invoking the aid of S. 491 Crl. P. C. and, praying for the issue of a writ Of habeas corpus for the custody of his daughter Kumari Girija from the same respondents, alleging the

same grounds alleged by him in Ants petition. This petition was heard by a Division Bench of this court. consisting of Anantanarayanan and Kunhamed Kutti, JJ and was dismissed. by order dated 1-5-1961. The ground of dismissal was that a writ of habeas corpus is a special remedy available to an aggrieved person only under circumstances of urgency and inability to resort to the ordinary remedies available in law. Anantanarayanan. J delivering the judgment of the Bench observed thus:

"It is sufficient for us to state that the present is not at all such a case, and that it is perfectly open to the petitioner to apply to a magistrate of competent jurisdiction for restoration to custody of his alleged minor daughter under S. 100.Crl. P. C. and S. 552 Crl. P. C. Since this is not a case of urgency and since the remedies statutorily provided for have not been exhausted, we dismiss this petition."

It is obvious that the Division Bench did not go into the merits of the application in the view which the beamed judges took that the petitioner must exhaust other statutory remedies open to him before resorting to an application under S. 491 Crl. P. C. But nevertheless the learned judges expressed the opinion that the daughter of the petitioner was not a minor but an adult perhaps 20 years old. They satisfied themselves that she was not detained against her will. The opinion regarding age is really an Obiter and not a finding; it was not necessary for the learned judges to determine, the age of the petitioner's daughter as the petition was practically dismissed in limine, though after the issue of a rule nisi.

(3) The, petitioner then filed Crl. P. No. BM of 1981 again praying for the issue of a writ of habeas corpus to obtain the custody of his daughter from the same respondents. In the first instance this application came on before one of us and notice was issued to the respondents by order dated 30-5-1961. In view of the fact that there was no authentic record or documentary evidence relating to the age of the petitioner's daughter at the time when the previous application Crl. M. JP. No. 736 of 1961 was dismissed. a direction was given for the radiological examination of the petitioner's daughter, by an expert attached to the Madras General Hospital. This was done and the Assistant Professor of Medical jurisprudence attached to the madras Medical College forwarded a report based upon radiological and physical examination of Miss. Girija, stating that she was aged, about 20 years. The petition came on for final disposal before Division Bench consisting of Anantanarayanan and Veeraswami JJ. but unfortunately on "the date of hearing the petitioner was absent. No counsel also appeared for him. The learned judges accepted the report of the medical expert and held that the alleged minor is not a minor at all, and that therefore the application in the nature of a writ of habeas corpus cannot be granted. The petition was accordingly dismissed. It must be noted that though the petitioner was absent on 3-7-1961 when his petition was called, the dismissal was not one for default but was based on the finding that the petitioner's daughter was not a minor.

(4) The petitioner then filed a third petition Crl. M. P. No. 1278 of 1961 praying for the, issue of a writ of habeas corpus against the same, respondents reiterating his contention that his daughter. is a minor, and that she is improperly detained by the respondents. The petitioner was represented by learned counsel, Mr. P. V. Chalapathi Rao, who argued at great length before us, that the finding record by this court in Crl. M. P. No. 856 of 1961 on the age of the petitioner's daughter was based on no evidence, that the report of the medical officer cannot be treated as evidence at all, and that therefore it was open to the petitioner to file a fresh petition for the issue of a writ of habeas corpus despite. the dismissal of the previous petitions. In the course of the arguments of the learned counsel, we observed that we had no jurisdiction to alter or set aside the prevous finding on the age of the petitioner's daughter, and thereupon learned counsel sought permission to withdraw the petition, and the petition was accordingly withdrawn and dismissed by order of Court dated 23-8-1961.

(5) This is the fourth petition, in which the petitioner again prays for the issue of a writ or habeas corpus for restoration of custody of his daughter to him from the respondents. In spite of our sympathies with the petitioner, who seems to be a parent in a disturbed state of mind due to the lapses of conduct on the part of his daughter, we are unable to appreciate the great tenacity with which he is making successive applications to this court in a persistent and annoying manner. The petitioner appeared in on this time and we beard arguments on the maintainability of this application as that is the question which arises at the very outset.

(6) This application purports to have been filed under Sec. 491, Cri. P. C. An application for the issue of a writ habeas corpus cannot be made under Art. 226 of the Constitution. Prior to 26-2-1960 the date of our Constitution, the power to issue a writ or direction in the nature of habeas corpus was only under S. 491 Crl. P. C. as the High Courts had no power to issue the common law or prerogative writ of habeas corpus. This was laid down by the judicial AIR 1939 213 (Privy Council) . Lord Thankerton, delivering the judgment of the Board, quoted with approval the following observation of the learned Chief Justice of this court made in the case which went up on appeal to the judicial Committee:

"The High Courts Act of 1861 authorised the legislature, if it thought fit to take away the powers which this court obtained as the successor of the Supreme Court, and Acts of the Legislature lawfully passed in 1875 and subsequent. years leave no doubt in my mind that the Legislature has taken away the power to issue the prerogative writ of habeas corpus in matters contemplated by S. 491 Crl. P. C., of 1898."

After the Constitution, S. 491 Crl. P. C. is indeed, redundant if not obsolete. But so long as S. 491 Crl. P. C. stands unrepealed the remedy afforded by that provision can he availed of. Both under S. 491 Crl. P. C. and under Art. 226 or the Constitution, the power to issue a writ in the nature of habeas corpus, is vested only in the High Court. It is therefore Permissible to treat the application

of the petitioner as being a compendious one under the two relevant provisions of law referred to above.

(7) It cannot be disputed that an application for a writ of habeas corpus can be maintained by a parent for restoration of custody of his or her minor child in the improper custody of others. A writ will lie in cases where a person is wrongfully detained by another private person as distinguished from the State under Art. 226 though an application under Art. 32 may not lie against a private person, as detention by a private person does not infringe any "fundamental right". This court has taken the view that this remedy under S. 491 Crl. P. C., can be availed of even in cases where the Guardians and wards Act is applicable though the writ could be issued only in extraordinary cases *D.P. Sampath Vs. Govindammal and Others*, It has also been held that the relief under S. 491, Crl. P. C. should not be refused merely because another remedy is open to the applicant *S. Rama Iyer Vs. K.V. Nataraja Iyer*, .

(8) The proceeding under S. 491 Crl. P. C. is certainly a criminal proceeding. On the dismissal of an application under S. 491 Crl. P. C. the order of dismissal is final in view of the provisions of S. 369 Crl. P. C. which states that save as otherwise provided by the Letters Patent or other instruments constituting the High Court the, High Court shall not after the judgment is signed alter or review the same, except to correct clerical error. The finality of such a decision is indefeasible and cannot be destroyed either by permitting an application by way of a review or the order or by way of second application praying for the same relief which in essence though in a disguised form, is one intended to obtain a cancellation of the previous order.

(9) In *Emperor v. Malhari Chikate*, 50 Bom L. R. 188. AIR 1945 Bom 326 a Full Bench of the Bombay High Court held that under S. 491 Crl. P. C. a detinuee, cannot make successive applications for a writ of habeas corpus and That it is not open to him to ask for a review of an order already made under that provision.

(10) A Full Bench of the Allahabad High Court in *Rex v. Satishgopal Gurha*, 1948 All LJ 483: AIR 1949 All 147 held that it is not open to a detinuee to move a fresh application under S. 491 Crl. P. C. based on grounds which, existed But were not urged when the earlier application was heard and dismissed. But it was observed therein that the dismissal of an, application under S. 491 Crl. P. C. will not bar a second application, where the further detention of a person has become illegal after the application was disposed of.

(11) It is therefore clear that treating the proceedings in the present case as proceedings under S. 491 Crl. P. C. this fourth successive application by the petitioner praying for the same relief as he prayed for in the first of the series is not maintainable and is incompetent. What is the position of the petitioner if these proceedings are deemed to be one under Art. 226 of the Constitution? Is it open to the petitioner to contend that though he cannot maintain this application

under S. 491 CrI, P. C. by reason of the dismissal of the prior applications, he can well invoke the aid of the Constitutional provision? We are of opinion that the petitioner is disentitled to maintain this application even under Art. 226 of the Constitution.

(12) Having regard to the fact that prerogative writs within the scope of Art. 226 of the Constitution have to be issued in the broad, and fundamental principles governing their issuance by the court of King's Bench in England, we think it proper to refer to the English law regarding the maintainability of successive applications for the issue of a writ of habeas corpus. Halsbury in Vol. II, 3rd Edn. sets out The rule thus at page 38, paragraph 69,:

"The applicant 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."

The second part of the above quotation relating to the power of each judge of the High Court to entertain an application is obviously based upon the well known Nigeria case, *Eshugbayi Eleko v. Govt. of Nigeria*, 1928 AC 459: AIR 1928 PC 300. The first part of the quotation, is intelligible as it only enables an aggrieved person to go to various courts of co-ordinate jurisdiction asking for the same relief. In criminal proceeding there is no Such thing as "res judicata", the doctrine known and applied to civil law, as there is no question of any party being vexed twice. A person complaining of an illegal detention can seek his remedy by way of release in any court of competent jurisdiction, and the fact that one court of co-ordinate jurisdiction has refused relief may not be a bar to his resorting to other courts of equal or superior jurisdiction.

(13) Wade and Phillips on Constitutional law, 5th Edn. page 373 refer to the Nigeria case, 1928 AC 459: AIR 1928 PC 300 as a curious case and observe thus:

"This illustrates the important constitutional safeguard that the writ of habeas corpus affords. An applicant may thus by way of renewed application, take his case before every Judge or the High Court of justice until he has exhausted all the available judges, but not, except by way of appeal, to the court of appeal: In *re Carroll*, 1931 1 KB 104."

It will now be convenient to refer to the Nigeria case, 1928 AC 459: AIR 1928 PC 300. In this case a tribal chieftain whose deportation was ordered sought to apply for the writ to one judge after another of the High Court of Nigeria and the Privy Council upheld his right to apply. Lord Hailsham, Lord Chancellor, observed thus:

If it he conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every Judge must hear the application on the merit. It follows that, although by the judicature Acts the courts have been combined in the one High Court of justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term, time or in vacation, and that he is bound to hear and determine the application on its merits notwithstanding that some other judge has already refused a similar application." This observation of Lord Hailsham seems to be as a result of misconception of an earlier dictum of Lord Halsbury in *Cox v. Hakes*. (1890) 15 AC 506. The question that arose for consideration in (1890) 15 AC 506 was whether the court of appeal had jurisdiction to entertain an appeal from an order of the Queen's Bench Division issuing a writ of habeas corpus. In that case Lord Halsbury observed thus.

"For a period extending as far back as our legal history the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might--see *Ex parte Partington*, (1845) 13 M & W 679--make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge."

A reference to the decision reported in (1845) 13 M & W 679 shows that what was observed by Park Baron in that case was that the aggrieved party had a right to the opinion of every court as to the propriety of his imprisonment and not to every judge composing the Court. It is somewhat significant to note the observations of other Law Lords in (1890) 15 AC 506. Lord Herschell said,

"It was always open to an applicant for it, if defeated in one court at once to renew his application to another. No court was bound by the view taken by any other.....Each Court exercised its independent judgment..... A person detained in custody might thus proceed from court to court until he obtained his liberty." Lord Bramwell observed,

Whether if one Division of the High Court before the Queen's Bench, Common Pleas, and Exchequer Divisions were fused, has refused the writ, then another Division would have been bound to entertain an application for one, I know no. If yes, then the judicature Act left the matter as it was before."

Lord Field said,

"It was the undoubted right of a subject detained in custody to question by habeas the lawfulness of his detention before every one of her Majesty's courts in succession."

Except Lord Hailsham who used both the expressions, court and judge, other law Lords who have been quoted above make it quite clear that The remedy of the detenu lay from court to court, and not from judge to judge. Indeed Lord Esher M. R. in the judgment of the Court of appeal from which the House of Lords heard the appeal in (1890) 15 AC 506 observed thus.

"It is not correct to say that under tile old system there could be an application to all the Judges in succession. There could be an application to all the courts in succession."

The Irish Supreme Court in the case in, the State (Dowling) v. Kingston 1937 ILR. 699, has commented upon the decision in the Nigeria case. It is not necessary to deal with that decision at, length and it is sufficient to quote the following observation of Fitz Gibbon J.:

"It is.....to my mind almost inconceivable that the legislature, when enacting the judicature Act for the express purpose of simplifying procedure and preventing the inconvenience which previously existed Where courts of co-ordinate jurisdiction pronounced different opinions on the same point, deliberately set up, for the purpose of habeas corpus applications and for them alone twenty eight independent tribunals of Co-ordinate jurisdiction, any single one of whom might, without the possibility of an appeal, overruled the considered opinion of she other twenty seven."

It seems to us that even under the English Law, there is no warrant, except for the observation in the Nigeria case, 1928 AC 459: AIR 19 8 PC 300, for holding that an unsuccessful applicant for the issue of a writ of habeas corpus can run the whole gamut of judges in the King's Bench Division with the indomitable courage and hope of being able to persuade at least one of them to give a verdict in his favour.

(14) It is worthwhile to quote the following observation of Mr. D. M. Cordon K. C. 23 Can Bar. Rev. 598.

"The power of prisoners to canvass the whole bench of Superior court judges is an indefeasible survival of archaic ideas that seems to have bean based on a misapprehension from the first.....".

The rule in the United States of America regarding successive applications for the issue of a writ Is thus stated by Ferris in his Extraordinary Legal Remedies at page 69:

"By the great preponderance of authority the principle of res judicata, when not otherwise provided by statute, has no application to habeas corpus proceedings where there is a refusal to discharge; a decision on one writ is no bar to subsequent proceedings..... Petitioner may address the courts over and over again, provided application be made to a superior court."

The rule as thus enunciated also seems to support the view that sphere is no bar

of a person going from court to court of co-ordinate jurisdiction or of superior jurisdiction to obtain redress. The rule cannot be extended, further so as to enable the party to seek the same relief in, the same court by applying to different judges on different occasions.

(15) Art. 226 of the Constitution enables the High Court to issue a writ of habeas corpus and whether a single judge or a Division Bench of the High Court exercises such jurisdiction it is so only in the right of the High Court is such. Under the rules of this Court applications for the issue of a writ of habeas corpus have to be heard and disposed, of only by a Bench of two judges. An order of dismissal of a, writ of habeas corpus by a Division Bench which is only an order of dismissal by the High Court cannot be reviewed either under the provisions of the Criminal Procedure Code, in view of the bar imposed by S. 369, or under any other provision of law. It is therefore inconceivable that a second application seeking the same relief which was asked for unsuccessfully in the first application can be maintained as any decision in the second application would really amount to a review or cancellation of the prior decision.

(16) In *Re: T. Venkateswara Rao and Others*, , *Govinda Menon and Basheer Ahmed Sayeed JJ.* held that there is no provision of law which enables the court to rehear an application for a writ of habeas corpus which has been disposed of on merits by the court after examining the materials placed before it even though the party or counsel was not present at the time when the petition was heard. *Govinda Menon* observed thus:

"Once the application had been looked into and disposed of on the merits there is no provision either in the Criminal Procedure Code or any other law for the time being in force which empowers the High Court to rehear such an application. An application for a writ of habeas corpus is of a criminal nature and no review is allowed in such matters."

In *Re: Prahlad Krishna Kurne*, a Full Bench of the Bombay High Court held that under Art. 226 a citizen has no right to present successive applications for issue of writ of habeas corpus to different judges of the same High Court. At page 26 *Chagla C. J.* observed Thus:

"The question still remains whether in cases that may not fall under S. 491 and which may fall under Art. 226 There is any independent jurisdiction conferred upon any judge of the High Court to issue writs contemplated by Art. 226."

(17) It is clear that even under Art. 226, it is only the High Court that can Issue a writ for the enforcement of a fundamental right. The jurisdiction is conferred upon the High Court as such and" not upon any judge or judges of that court and therefore when a Division Bench of this court bears an application under Art. 226 it is hearing that application as the High Court and its ultimate decision is not their decision but the decision of the High Court.

"It is clear that-no court has an in here its power of review. A power of review like

a Power of appeal must be conferred by statute. As far as the Criminal Procedure Code is concerned, no power of review is given to the High Court In criminal matters, and there is nothing in Art. 226 which would induce us to hold That the Constitution has conferred a power upon the High Court of review in matters falling under the article.... Indeed Mr. Sule partially concedes the principle of finality because he admits that he would have no right to approach the same judge who has once decided the application either under Sec. 491 or under Art. 226. If the Principle of finality applies to a judge of this Court, it is difficult to understand why the principle of finality should not apply to the High Court as such."

We might also refer to an observation of the Supreme Court in *Godavari Parulekar Vs. State of Bombay and Others*, , which seems to indicate that a second application for a writ of habeas corpus will not lie after the dismissal of the first,. At P. 214 (of SCR), (at P. 53 of AIR) Vivian Bose J. observed thus:

The petitioner endeavoured to have her application reopened an the merits contending again that the grounds of detention are vague. She relies on *Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others*, Where another detenu was released by another Bench of this court in circumstances which, according to her, are very similar. But we are unable to allow this as her petition has already been rejected on the merits."

The petitioner relied upon the decision of the Punjab High Court in *Ramjilal v. Rex*, AIR 1949 EP 67 in support of his contention that the present application is maintainable in that case one of the questions which was referred to the Full Bench was this:

"If a petition under S. 491 Cr. P.C. is disposed of on merits, can a fresh petition lie on the same facts and with the same object (i) when all the questions raised in the said petition were disposed of on the first and (ii) when some of the points raised in the second petition were disposed of in the first petition but the rest were left undecided?

Four petitions were made by one Jagadish Mitter for the release of four different persons who were alleged, to have been illegally arrested under S. 3 of the Punjab, Public Safety Act Rules nisi were issued but on the date of the final hearing of the application, the petitioners counsel absented himself. The learned Judge however heard the learned Advocate General and dismissed the petition. An application for restoration of these petitions was made on the day next, after the disposal of the petitions and that also was dismissed on the ground that the petition for habeas corpus was dismissed not for default, but on merits, and that there was no power in the High Court to set aside The orders already passed. Then fresh petitions were filed seeking for the same relief as was prayed for in the dismissed applications. Mahajan J. as he then was, who delivered the majority judgment of the Full Bench, gave the following answer to the question referred,

"My answer, therefore, to the fourth question is that successive applications on identical grounds do not lie to every Judge of the Court. They however lie to the court, i.e. only those judges who are sitting In the Criminal side Single Bench and there is no bar to the maintainability of those applications because of the final decision made by the court on a former application on identical facts."

With great respect to the learned judge we are unable to agree with this view. The learned judge referred to the Nigeria case AIR 1928 PC 300 and observed thus:

"If in a place like Nigeria such practice is not unreasonable and does not lead to waste of time and money, it can hardly be argued that in a free country like India this practice would be unreasonable and would lead to waste of time. The writ of habeas corpus is a very valuable writ to the subject as it concerns his liberty and the High Court has been given jurisdiction to issue the writ whenever it thinks fit and if at any time in can be satisfied that the writ should issue then no technicality of law should stand in the way of setting at liberty the detenu."

Courts must jealously guard the liberty of a citizen, and it is the duty of the court to protect such liberty and safeguard it from, being encroached upon or trampled down either by a private individual or by the Executive Government. But this is not to say that a defeated litigant can in the name of liberty and under the slogan of fundamental right file petition after petition to the same High Court in the hope of succeeding eventually at some time before some Judge. This is nothing but a Sisyphean task and we cannot but deprecate and condemn such practice.

(18) We find ourselves in respectful agreement with the view expressed by the Full Bench of the Bombay High Court and we express our respectful dissent from the judgment of the Punjab High Court.

(19) We hold that the petition is not maintainable and is incompetent. The petition is dismissed.

DF/O/D.R.R.

(20) Petition dismissed.