

(2022) 04 KAR CK 0018

In the Karnataka High Court

Case No : Writ Petition Habeas Corpus No. 78 Of 2021

Sameer Hamsa Ramla

APPELLANT

Vs

State Of Karnataka & Others

RESPONDENT

Date of Decision : 12-04-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 125

Citation : (2022) 04 KAR CK 0018

Hon'ble Judges : Alok Aradhe, J;S. Vishwajith Shetty, J

Bench : Division Bench

Advocate : Prabhjit Jauhar, Tuuka Bhatnagar, Thejesh P, Rama R. Iyer

Final Decision : Dismissed

Judgement

Alok Aradhe J

1. This petition has been filed by the petitioner seeking the following reliefs:

Issue a writ of order or direction more particularly one in the nature of writ of habeas corpus directing the respondent No.1 and 2 Police Authorities to produce the minor daughter Zoya Sameer Malike (DOB 10.07.2018) of the petitioner, who is a permanent resident and a naturalized citizen of the USA before this Hon'ble Court, who is at present in the unlawful custody of respondent Nos.3 – 5, and cause return of the said minor child Zoya Sameer Malike to the jurisdiction of the US court in compliance with the order dated 28.06.2021 passed by the Circuit Court of Cook County, Illinois, Country Department to enable the minor child to go back to US and if they fail to do so within a fixed time period, respondent No.1 and 2 be directed to immediately handover the custody of the said minor child of the petitioner to enable him to take the minor child back to the jurisdiction of US Court and pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

2. Facts giving rise to filing of this petition briefly stated are that the petitioner (hereinafter referred to as 'the husband' for short) and respondent No.3

(hereinafter referred to as 'the wife' for short) got married on 25.09.2016. On 07.12.2016, wife went to U.S. to start her life with husband. On 10.07.2018, a daughter namely Zoya Salim Malike (hereinafter referred to as 'the daughter' for short) was born in Chicago. Thereafter, the wife applied for H1B visa on 07.04.2021. The wife made a complaint on 02.06.2021 to the police authorities in U.S and thereafter, on 03.06.2021 invoked the jurisdiction of the Court at U.S. and applied for an emergency protection order. The emergency protection order was granted on the same date i.e. 03.06.2021 and custody of the daughter was handed over to the wife.

3. The wife traveled along with the daughter to India on 20.06.2021. Thereafter, on 21.06.2021, the husband filed a motion for dissolution of marriage and sought custody of the daughter in U.S. Court. The aforesaid proceeding filed by the husband was consolidated with the proceeding initiated by the wife seeking emergency protection order and on 22.06.2021, the emergency protection order was extended till 28.06.2021. The husband, filed an emergency motion on 21.06.2021 for return of the daughter before the Circuit Court of Cook County, Illionis after having learnt that the wife had travelled to India along with the daughter. The said Court on 28.06.2021 passed an order directing repatriation of the daughter from India.

4. After an order of repatriation of the daughter was passed, the wife filed a petition under the Guardian and Wards Act, 1890 seeking custody of the daughter in Bengaluru. Thereafter, a petition under Section 125 of the Code of Criminal Procedure seeking maintenance was also filed on 31.07.2021. The husband thereafter filed the instant petition on 04.09.2021 seeking the reliefs as stated supra.

5. Learned counsel for the petitioner submitted that the wife had studied in U.S. and had been working in U.S. as a Software Consultant. It is further submitted that wife on her volition and accord, on 07.12.2016 travelled to U.S. to start her life with the husband. It is also submitted that the wife is in the habit of running away with the minor daughter. It is urged that wife admittedly applied for H1B visa which evinces her intention to settle in U.S. It is also urged that the wife herself had invoked the jurisdiction of Court at U.S. and an order was passed in her favour. It is contended that the daughter is three and a half years old and is a U.S. citizen and the welfare of the daughter would be best served by directing her to return to U.S.

6. It is also submitted that the daughter needs the love and affection of the husband and wife. It is also contended that the husband is ready and willing to make a 3 bedroom accommodation to the wife and is prepared to withdraw the proceeding initiated by him for dissolution of marriage. It is therefore submitted that the wife should be directed to return to the jurisdiction of the Court in U.S. In support of aforesaid submissions, reliance has been placed on the decisions of High Court of Telangana in 'GHADIAM HARSHAVARDHAN REDDY Vs. STATE OF TELANGANA AND ORS.' MANU/TL/1033/2021 and the decisions of Supreme Court

in 'LAHARI SAKHAMUJRI Vs. SOBHAN KODALI' (2019) 7 SCC 311, 'YASHITA SAHU Vs. STATE OF RAJASTHAN & ORS.' (2020) 3 SCC 67, 'TEJASWINI GAUD Vs. SHEKHAR JAGDISH PRASAD TEWARI' (2019) 7 SCC 42 AND 'NILANJAN BHATTACHARYA Vs. THE STATE OF KARNATAKA' 2020 SCC ONLINE SC 928.

7. On the other hand, learned counsel for the wife submitted that wife had only invoked the jurisdiction of US court and sought an interim protection as she was subjected to domestic violence by the husband and had not submitted herself to the jurisdiction of the US Court either with regard to dissolution of marriage or pertaining to custody of the child. It is further submitted that the wife had not engaged any counsel in the proceeding for dissolution of marriage. It is pointed out that the order dated 28.06.2021 is an ex parte order and has been passed without assigning reasons. It is also contended that the material facts were suppressed by the husband in the proceeding, which resulted in order dated 28.06.2021.

8. It is submitted that wife is the primary care giver of the daughter and daughter being three years and nine months old requires the love and attention of the mother. It is further submitted that out of three years and nine months, the child has spent two years and nine months with her mother and grand parents in India. It is pointed out that the husband has another girl child viz., Aiyat from the previous marriage and the husband does not have the custody of the said child as well and has only visitation rights. It is submitted that wife is a well educated person with Masters Degree in Electrical engineering and has been working as an Engineer in U.S. and has been taking care of the daughter. It is pointed out that daughter has been admitted to Vivero International School, Bangalore.

9. It is contended that custody of the daughter is with the mother which by no stretch of imagination can be termed as illegal / unlawful detention and emergency order protection dated 03.06.2021 passed by the U.S. Court entrusted the child to the care of mother till 22.06.2021 and the daughter has not been bought in violation of any order of the court. It is also contended that even under Muslim Personal Law, the mother is entitled to the custody of the daughter till she attained the age of puberty. In support of aforesaid submissions, reliance has been placed on decisions in 'PRATEEK GUPTA VS. SHILPI GUPTA AND OTHERS', (2018) 2 SCC 309, 'KANIKA GOEL VS. STATE OF DELHI', (2018) 9 SCC 578, 'JOSE ANTONIO ZALBA DIEZ DEL CORRAL VS. STATE OF WEST BENGAL AND OTHERS', 'SNEHA HARISHCHANDRASUMITHRA VS. STATE OF KARNATAKA (WPHC NO.145/2019)', 'ROHITH THAMMANA GOWDA VS. STATE OF KARNATAKA', 'ATHAR HUSSAIN VS. SYED SIRAJ AMED AND OTHERS', (2010) 2 SCC 654, 'MURTAZA QUAID MAHUWALA VS. STATE OF GUJARAT', AIR ONLINE 2020 GUJ 120, 'SURIEZ VS. M.ABDUL KHADER AND OTHERS', (2017) SCC ONLINE KAR 4935, SUHARBI VS. D.MUHAMMED', (1987) SCC ONLINE KER 16', 'MT.SAKINA BEGAM VS. MALKA ARA BEGUM', AIR 1948 ALLAHABAD 198, 'MIR MOHAMED BAHAUDDIN VS. MUJEE BUNNISA BEGUN SAHIBA', AIR 1952 MADRAS

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10. Learned counsel for the appellant by way of rejoinder submitted that father and mother are equal partners in a joint parenting system and the wife herself had invoked the jurisdiction of court at U.S. and had prayed for custody of the child. It is contended that there is no material on record to indicate that any harm was caused to the daughter between 03.06.2021 to 22.06.2021. It is also contended that there is no material on record to demonstrate that whether any harm will be caused to the daughter if she is repatriated to U.S. It is urged that the daughter is young and has not taken roots in India and the wife cannot be allowed to disregard the proceeding before the competent court.

11. We have considered the rival submissions and have perused the record. Admittedly, the marriage between the parties was performed on 25.09.2016 and on 07.12.2016, wife went to U.S. to start her life with husband. It is also not in dispute that on 10.07.2017, the daughter was born in Chicago. The wife invoked the jurisdiction of the court at U.S. and applied for emergency protection order, which was granted on 03.06.2021 and the daughter was entrusted to the care of mother till 22.06.2021. The relevant extract of the order passed by Circuit Court of Cook County, Illinois, in favour of wife who was petitioner in the proceeding, reads as under:

5. (a) Petitioner is granted physical care and possession of the minor child/ren and /or

(b) Respondent is ordered to Not remove the minor child/ren Zoya Sameer Malike from physical care of petitioner or any designated caregiver.

Thereafter, the wife traveled to India along with the daughter on 20.06.2021.

12. The order dated 28.06.2021, the enforcement of which is sought by means of this writ petition passed by the Circuit Court of Cook County, Illinois, in favour of husband reads as under:

Xxxx

IT IS HEREBY ORDERED:

(1) Counsel for the respondent is granted leave to withdraw his appearance for the respondent under separate order.

(2) The petitioner is granted leave to travel to India to retrieve the MINOR CHILD.

(3) The petitioner shall have temporary exclusive possession and control over the MINOR CHILD until further order of this court.

(4) This cause is set for status on August 10, 2021 at 9.30 AM in Calendar 23.

The aforesaid order is an ex parte order and has been passed after the wife had traveled to India along with the daughter. Thus, it is pertinent to note that on the day i.e., 20.06.2021, the wife traveled to India, neither an order of the court was

operating against the wife and the child nor there was any legal impediment in bringing the daughter to India.

13. In NITHYA ANAND RAGHAVAN *supra*, an *ex parte* interim order was passed on 08.01.2016 granting custody of minor child to father by High Court of Justice, U.K. The husband filed a writ petition before the High Court of Delhi seeking a writ of habeas corpus for compliance of order dated 08.01.2016. The writ petition was allowed by Delhi High Court by an order dated 08.07.2016 and in Special Leave Petition, the order passed by the Delhi High Court was assailed by the wife before the Supreme Court *inter alia* on the following grounds:

(i) that minor child suffers from a cardiac disorder.

(ii) not in the best interest of the child to repatriated to U.K as it would cause immense physical and mental harm to the child, in the light of physical, verbal and mental abuse meted out by the husband.

14. The Special Leave Petition was dismissed by a three Judge Bench of the Supreme Court and in para 46, para 47 relevant extract of para 49, para 53 and para 66 read as under:

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign Court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign Court or resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the

child.

49. We hold that the custody of the minor with the appellant, being her biological mother, will have to be presumed to be lawful.

53. Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother [see Sarita Sharma (supra) para 6]. No such material or evidence is forthcoming in the present case except the fact that the appellant (mother) has violated the order of the U.K. Court directing her to return the child to the U.K. before the stipulated date.

66. The facts in all the four cases primarily relied upon by the respondent no.2, in our opinion, necessitated the Court to issue direction to return the child to the native state. That does not mean that in deserving cases the Courts in India are denuded from declining the relief to return the child to the native state merely because of a pre-existing order of the foreign Court of competent jurisdiction. That, however, will have to be considered on case to case basis - be it in a summary inquiry or an elaborate inquiry. We do not wish to dilate on other reported judgments, as it would result in repetition of similar position and only burden this judgment.

15. In view of aforesaid enunciation of law by a three judge bench of the Supreme Court, following broad propositions relevant for the case in hand may be culled out:

(i) The remedy of writ of habeas corpus cannot be used for mere enforcement of directions given by a foreign court against a person within its jurisdiction and to convert that jurisdiction into an executing court.

(ii) In a habeas corpus petition, at the outset, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person. It can be presumed that custody of a minor with his / her mother is lawful.

(iii) In such a case, only in exceptional situation the custody of the minor can be ordered to be taken away from her mother for being given to any other person including the father of the child.

(iv) The other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

(v) The order of foreign court must yield to welfare of the child.

(vi) Ordinarily the custody of a girl child who is around 7 years of age must ideally be with her mother unless there are circumstances to indicate that it will be harmful to a girl child to remain in the custody of the mother.

(vii) In deserving cases, the courts in India are not denuded from declining the relief to return the child to the native state merely because of a pre existing order of foreign court of competent jurisdiction, which has to be considered on case to case basis be it summary enquiry or elaborate enquiry.

16. On the touchstone of aforesaid legal propositions, we may examine the facts of the case in hand. The daughter is aged about 3 years and 9 months. The daughter shas spent more than 2 years in India. The daughter is in the custody of the mother and therefore, the custody cannot be termed as illegal / unlawful. Ordinarily the custody of a girl child of tender age should remain with the mother. The daughter has not been moved out of U.S in violation of any order of the Court. After the wife had left U.S. on 20.06.2021, the husband initiated proceeding for dissolution of marriage and custody of the daughter on 21.06.2021.

17. It is not in dispute that wife is an Engineer and is qualified and is financially independent to take care of the needs of the child. The girl child is residing with her mother and grand parents in Bangalore. Though the daughter is U.S. citizen, yet she has not developed any roots in U.S. On account of her stay in India, there is no disruption of her education and she is studying in pre school in Bangalore. The mother is the primary care giver of the daughter. The husband is employed and if the daughter is repatriated to U.S., he alone would not be in a position to take care of his daughter. The continuance of the daughter with her mother and grand parents in Bangalore in the fact situation of the case is in the best interest of the daughter.

18. It is pertinent to note that the wife has the custody of the daughter and therefore, her custody cannot be said to be illegal. The remedy of writ of habeas corpus cannot be used for enforcement of an exparte order passed by a foreign court which was not in existence at the time the daughter left U.S. No exceptional circumstances are made out by the husband to demonstrate that the daughter should be repatriated to U.S. and in case, the daughter continues to stay with the mother, it would not be in the best interest of the daughter. No material which is convincing or persuasive enough for grant of prayer in the writ petition has been adduced.

19. As we have already held that no case for repatriation of the daughter to U.S. has been made out, it is not necessary for us to advert to the offer made by the husband that he is willing to provide an accommodation to the wife in U.S. and is ready and willing to withdraw the proceeding for dissolution of marriage. Similarly, the submission that mother of the husband would come to U.S. to look after the child is concerned, suffice it to say that the same is also not relevant in view of our conclusion recorded in preceding paragraph. The decision of the Supreme Court in YASHITA SAHU supra has no application to the fact situation of the case as the child in the aforesaid case was bought in violation of the order passed by the U.S. court, which is evident from paragraph 13 of the decision. In the instant case, the daughter has not been bought to India in violation of any

order of the court.

20. It is pertinent to note that the husband had not sought the custody of the child but is merely seeking repatriation of the child to the Court in U.S. Ordinarily, we would have granted the visitation right to the husband bearing in mind that it is in the best interest of the child to have parental care of both the parents if not joint then atleast separate, but taking into account the fact that the husband has already invoked the proceeding in the U.S. Court seeking dissolution of marriage and the custody of the child, we refrain from doing so.

In view of preceding analysis, we do not find any merit in this petition. The same fails and is hereby dismissed.