

(2015) 01 AHC CK 0081
In the Allahabad High Court
Case No : Special Appeal No. 1183 of 2014

Sunder Lal Jaiswal and Others	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 15-01-2015

Acts Referred:

Dowry Prohibition Act, 1961 — Section 3, 4
Penal Code, 1860 (IPC) — Section 304-B, 498-A

Citation : (2015) 1 ACR 1181 : (2015) 1 ADJ 580 : (2015) 4 ALJ 167 : (2015) 109 ALR 502

Hon'ble Judges : Vijay Lakshmi, J.; Rakesh Tiwari, J.

Bench : Division Bench

Advocate : Harish Chandra Dwivedi, for the Appellant; D.S. Mishra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—The present special appeal is preferred challenging the judgment and order dated 17.11.2014 passed by the learned Single Judge in Habeas Corpus Writ Petition No. 7548 of 2014 (Sunder Lal Jaiswal and another v. State of U.P. and others). By the aforesaid judgment the Habeas Corpus Writ Petition preferred by the petitioners had been dismissed.

2. The relief claimed by the appellant is for allowing the special appeal with costs and setting aside the judgment and order impugned aforesaid.

3. The impugned judgment is challenged on the ground that Court committed a patent error of law in dismissing the writ petition on the ground of alternative remedy which is a direction in futility itself for the reason that the writ petition had been entertained on merits by the Court earlier. It is also assailed on the ground that the judgment impugned dated 17.11.2014 is self contradictory as the Writ Court has recorded opinion on the merits of the case, which is to be pursued by the appellant for the alternative remedy. Therefore, if the judgment is allowed to operate then it will "result into adverse consequences particularly,

when the Writ Court had taken cognizance on the similar facts of Habeas Corpus writ petition of the appellants and had passed order to produce the corpus on 25.7.2011 and 1.9.2011. The appellant No. 1 has also been granted permission to meet and visit the corpus for a day in week, therefore, now on dismissal of the writ petition on the grounds of alternative remedy his rights would be adversely affected.

4. It is lastly argued that after dismissal of the Habeas Corpus writ petition in default the appellant was directed to file a fresh writ petition on fresh grounds, where was filed by him and that the Court has dismissed the petition by not taking cognizance of the fresh grounds taken by the appellant. The matter of custody of minor child, his welfare is paramount consideration. There is always fresh grounds inasmuch as, continuous cause of action remains till getting the custody of minor child, which was ignored by the Writ Court while dismissing the writ petition on the ground of lack of fresh grounds whereas there are sufficient grounds to maintain the writ petition.

5. Learned counsel for the respondent submits that the Writ Court has considered all relevant facts and circumstances of the case argued by the appellant and after considering the same has passed the impugned judgment and order giving cogent reasons for arriving at the conclusion therein.

6. We find from the judgment itself that the Court has noted that the habeas corpus writ petition No. 7548 of 2014 (Sunder Lal Jaiswal and another v. State of U.P. and others) in which the impugned judgment has been passed in second writ petition for habeas corpus filed by the petitioners for directing respondent Nos. 4 and 5 to produce the corpus i.e. petitioner No. 2 Manas Jaiswal s/o. Sunder Lal Jaiswal (petitioner No. 1) before the Court and hand over his custody to him.

7. From the facts on record it appears that petitioner No. 1 was married to Smt. Vineeta Jaiswal d/o. respondent No. 4 and 5 on 20.2.2007. Manas (corpus) was born out of the wedlock on 15.4.2008. Vineeta committed suicide on 24.9.2010 and at the time of funeral Manas was given in custody of respondent No. 4 and 5 by his father i.e. petitioner No. 1 Sunder Lal Jaiswal. A F.I.R. also appears to have been filed by respondent No. 4 and 5 on the basis of which Crime No. 719 of 2010 at Police Station-Madiyaon, District-Lucknow was registered on 1.10.2010 under Sections 498-A, 304-B IPC and under Section 3/4 of Dowry Prohibition Act. The contention of the learned counsel for the appellant is that he had requested respondent Nos. 4 and 5 to send his son to his parental house but the corpus was not sent and, therefore, he sent his colleague K.K. Pandey to meet with corpus Manas Jaiswal on 12.6.2011, who informed that respondent Nos. 4 and 5 instead of giving affection to corpus were creating terror of petitioner No. 1 in his mind and they were not taking proper care of the corpus by providing him better education. In this view the petitioner filed Habeas corpus Writ Petition No. 40477 of 2011 which was dismissed in default vide order dated 16.10.2012 as stated above. On recall application being made the application itself was dismissed with directions to file fresh writ petition on fresh grounds.

Therefore, he has preferred this writ petition. Per contra learned counsel for the respondent has argued that the petitioner No. 1 has entered into a second marriage thus, the welfare of the corpus in the hands of his father would not be better than in the hands of respondent Nos. 4 and 5 who are maternal grandfather and maternal grandmother of the corpus respectively. Challenging the very maintainability of the second habeas corpus writ petition it is stated that no new ground has been taken by the petitioner as was directed by the Court.

8. After hearing learned counsel for the parties and on perusal of the aforesaid finding of the Writ Court we are of the considered opinion that respondent Nos. 4 and 5 are maternal grand parents of the corpus Manas Jaiswal whose custody has been entrusted to him by the petitioner No. 1 himself after the unnatural death of his mother. We further find that neither the custody of corpus has been taken by the respondent Nos. 4 and 5 forcefully from petitioner/appellant or illegally. The daughter of respondent Nos. 4 and 5 was the natural mother of corpus. Petitioner No. 1 i.e. father of corpus Manas Jaiswal having entered into second marriage and Court has rightly not interfered in the matter as respondent Nos. 4 and 5 who are natural grand maternal parents of the corpus are looking after his welfare and education, his custody cannot be given to petitioner No. 1 merely on the ground that he had means to provide better education. The Court after appreciation of evidence in the order dated 17.11.2014 has recorded finding which reads thus:

"I am of the view that no cause of action arises for fresh writ of habeas corpus on the basis of grounds alleged by petitioner to be fresh grounds. Therefore, in view of order dated 13.1.2013 passed by this Court on recall application moved by the petitioner, this writ petition is not maintainable." 9. Though it appears that the police after investigation submitted final report but there is nothing on record to establish that the final report has been accepted by the Magistrate.

10. The corpus Manas Jaiswal was given by the petitioner No. 1 to respondent Nos. 4 and 5 even before his second marriage and, therefore, it can be in the interest of the corpus that he remains with his natural maternal grandparents than with his step mother. Considering all the facts and circumstances of the case and for all the reasons stated above, we do not find any illegality or infirmity in the findings recorded by the Writ Court.

The appeal is accordingly, dismissed. No order as to costs.