

RASHMI AJAY KR. KESHARWANI & ANR.

v.

AJAY KR. KESHARWANI AND ORS.

(Criminal Appeal No. 518 of 2012)

MARCH 12, 2012

**[G.S. SINGHVI AND SUDHANSU JYOTI
MUKHOPADHAYA, JJ.]**

Constitution of India, 1950 - Article 226 - Writ of Habeas Corpus - Maintainability - Matrimonial dispute between wife and husband - Both of them living separately - The son born out of the wedlock living with the mother - In one petition filed by the husband before the High Court address of the wife shown to be of Maharashtra - Husband also filing writ of Habeas Corpus, for producing the child before the Court wherein address of the wife was shown to be of Uttar Pradesh - High Court issued non-bailable warrant against the wife - On appeal, held: No case was made out to entertain a writ of Habeas Corpus - The case was filed by the husband with wrong address to mislead the High Court - The allegation by the husband that the son has been illegally detained by his mother is wrong as the son has been residing with his mother since his birth - A writ of Habeas Corpus is not to be issued in the matter of course, specially when the writ is sought against a parent for the custody of a child - Writs.

Capt. Dushyant Somal vs. Smt. Sushma Somal and Ors. (1981) 2 SCC 277 - relied on.

Case Law Reference:

(1981) 2 SCC 277

Relied on

Para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 518 of 2012.

A From the Judgment and Order dated 09.11.2011 of the High Court of Judicature at Allahabad in Habeas Corpus Writ Petition No. 36326 of 2011.

Shomila Bakshi for the Appellant.

B R.K. Gupta, Suraj Singh, Pradeep Misra for the Respondent.

The Order of the Court was delivered

ORDER

C 1. Leave granted.

D 2. 1st appellant-Rashmi is the wife and 2nd appellant- Aryan is the son of the 1st respondent-Ajay Kumar. The 1st appellant and the 1st respondent were married on 20th April, 2001 as per Hindu rites and out of their wedlock the 2nd appellant-Aryan was born on 4th November, 2003.

E In the present case the appellants have challenged the order dated 9th November, 2011 passed by the Allahabad High Court in the Habeas Corpus Writ Petition No.36326 of 2011, whereby the High Court issued a non-bailable warrant against the 1st appellant to ensure her presence and the production of the 2nd appellant.

F 3. According to the 1st appellant, since her marriage, she was constantly subjected to mental and physical torture by the 1st respondent and her in-laws for bringing insufficient dowry. After one and a half years since the birth of their son, both the appellants (wife and the son) were driven out of the matrimonial house by the 1st respondent and her in-laws. The welfare and plight of the minor son was not thought of by them. Faced with such a situation, the 1st appellant-Rashmi along with her son took shelter at her parent's home at Biwandi, District Thane, Maharashtra.

H

RASHMI AJAY KR. KESHARWANI & ANR. v. AJAY 1155
KR. KESHARWANI AND ORS.

4. The 1st respondent-Ajay Kumar filed a petition under Section 13(1)(a) of the Hindu Marriage Act, 1955 on 18th April, 2006 being Marriage Petition No. 253/2006 before the Principal Judge, Family Court, Allahabad for dissolution of marriage. In the said case by an ex parte order dated 6th February, 2007 the Family Court, Allahabad granted a decree of judicial separation between the parties. A
B

5. The 1st respondent-husband being dissatisfied with the abovesaid order of Family Court, Allahabad has preferred a First Appeal being No.292/2007 before the Allahabad High Court to ensure the dissolution of marriage, which is pending. C

6. The 1st appellant filed a Special Civil Suit being No.591 of 2007 under Hindu Marriage Act on 4th September, 2007 in the Court at Bhiwandi for return of Stridhan and for maintenance. In the petition under Section 24 of the Hindu Marriage Act, the Civil Court allowed a maintenance of Rs.5,000/- each in favour of the 1st appellant-wife and the son(2nd respondent). Subsequently, having noticed that the maintenance amount has been paid in favour of the appellants, the Court at Bhiwandi by order dated 18th April, 2011 directed the 1st respondent-husband to pay arrears of Rs.4,90,000/- towards maintenance. According to the 1st appellant-wife, the 1st respondent-husband has not yet paid any amount towards maintenance and is in default of the Court's order. D
E

7. A Miscellaneous Application No.743/2010 has been filed by the 1st appellant-wife in the Court of the Judicial Magistrate First Class, Bhiwandi under Section 13(1) of the Protection of Women from Domestic Violence Act, 2005. A criminal complaint under Section 498A of Indian Penal Code has also been lodged by her against the 1st respondent-husband and others. The Court of the Judicial Magistrate First Class, Bhiwandi in Criminal Case No.1013/2010 has noticed that the 1st respondent has already appeared before the Court at Bhiwandi. F
G

H

A 8. On 27th April, 2011 the 1st respondent along with two others (the father and mother of the husband) preferred an application under Section 482 of Criminal Procedure Code in the Bombay High Court in Criminal Application No.397/2011 to set aside the order dated 20th November, 2010 passed in
 B Regular Criminal Case No.1013/2010 by the 4th Judicial Magistrate First Class, Bhiwandi. In the said case, the 1st respondent-husband has shown the address of 1st appellant-wife as follows:

C "Smt. Rashmi Ajaykumar Kesarwani
 Age:34 years, Occ-Teacher
 Residing at M.H.No.31, Vishnu Compound,
 Above Monika W Sizing AasBibi,
 Kalyan Road, Bhiwandi,
 Dist. - Thane."

D Though on 27th April, 2011 the 1st respondent along with his parents filed a petition under Section 482 of Criminal Procedure Code before the Bombay High Court in Criminal Application No.397/2011 showing the Maharashtra address, after about one and half months he filed the writ of habeas
 E corpus under Section 226 of the Constitution of India showing the 1st appellant-wife as residing at Allahabad with the following address:

F "Smt. Rashmi Ajay Kumar Keshewani Wife of Ajay Kumar Keshewani daughter of Sri Purshottam Keshewani Resident of House No.849, Mutthiganj, Kanya Chowraha Road, Police Station Mutthiganj, District Allahabad."

G 9. On 7th July, 2011, the learned Single Judge of the Allahabad High Court while issuing a notice to the first appellant-wife (respondent No.4 in the Habeas Corpus Writ Petition) making it returnable within four weeks, called upon her to produce Aryan(petitioner No.1) on 10th August, 2011. The 1st appellant having come to know of the case engaged a lawyer, who failed to appear. On 9th November, 2011, the learned
 H Single Judge issued a non-bailable warrant against the 1st

RASHMI AJAY KR. KESHARWANI & ANR. v. AJAY 1157
KR. KESHARWANI AND ORS.

appellant-wife (respondent No.4) through C.J.M., Allahabad A
ensuring her presence before the Court. The said order is under
challenge in the present appeal.

10. On 29th November, 2011 this Court issued a notice B
to the 1st respondent and stayed the operation of the impugned
non-bailable warrant. Notice was duly served on the 1st
respondent but he refused to accept the dasti notice. Notice
on other respondents Nos.2 to 4 was also served.

11. The learned counsel for the appellants submitted that C
no case was made out to entertain a writ of habeas corpus.
The High Court ought not to have issued any notice to the wife
rather it should have dismissed the writ in limine. Reference was
made to the addresses shown by the 1st respondent in the
different writ petition and applications and also to the pleading D
made by the 1st respondent (second writ petitioner) in the writ
of habeas corpus.

12. We have heard the learned counsel for the appellants
and perused the documents filed along with the appeal.

13. A combined reading of the habeas corpus writ petition E
filed by the 1st respondent before the Allahabad High Court
simultaneously with the criminal application filed by him, before
the Bombay High Court will show that no case is made out for
issuance of a writ of habeas corpus and that the said case was
filed with a wrong address to mislead the Allahabad High Court. F
The relevant portion of the Habeas Corpus Writ Petition
No.36326 of 2011 reads as follows:

"6. That after the aforesaid marriage respondent No.4 G
lived with petitioner No.2 in her matrimonial home for about
a week and thereafter she went to her parents at Mumbai
(Thane) and subsequently she came back to Allahabad at
petitioner NO.2's house and her behaviour became worse
with petitioner No.2 and his family members and thereafter
on 02.0.2004 she left her matrimonial home along with H

A Master Aryan petitioner No.1 and went away to her parents home and since then she did not return back.

B 7. That the petitioner No.2 repeatedly visited and tried to persuade respondent No.4 to return back to her matrimonial home but she refused to return back and thereafter petitioner No.2 filed a divorce petition vide No.253 of 2006 Ajay Kumar Keshewani Vs. Smt. Rashmi Keshewani U/s 13(1)(A) B of Hindu Marriage Act on 18/04/2006 before the Court of Judge Family Court, Allahabad.

C 8. That the above noted divorce petition was decreed vide order dated 6.02.2007 and a decree for judicial separation was ordered by the Court of Principal Judge Family Court, Allahabad which was never challenged by respondent No.3.

D 9. That the petitioner No.2 used to regularly visit to meet his son petitioner No.1 and fulfilled his needs and tried his best to take care of his as he has all love and affection for him.

E 10. That the respondent No.4 is a lady of modern life style and does not take care of her son master Aryan (Petitioner No.1) and she leaves him all alone at home as she leaves home early morning and returns back home late night due to which petitioner No.1 is under deep mental agony and pressure.

F 11. That the respondent No.4 has got master Aryan (Petitioner No.1) admitted in a very low standard school and his education is being hampered as a result of which his future will be darkened.

G 12. That the respondent No.4 is unable to provide proper resources to petitioner No.1 for his proper physical, mental and educational development which will darken the future of petitioner No.1.

H

13. That it is further very important to mention here tht on 20/04/2011 master Aryan (Petitioner No.1) made a Telephone call to Petitioner No.2 and informed that a person regularly visits the home of respondent No.4 and spends time with respondent No.4 and he has heard them talking about their marriage which they are going to perform soon, due to which he is under great mental tension and therefore he wants to live with petitioner No.2 and he is being illegally detained. A
B

14. That the petitioner No.1 has also informed petitioner No.2 that his mother (Respondent No.4) does not look after him as she never cares about him, she never takes interest in his studies and his needs and the behaviour of respondent No.4 is become cruel to him day by day. C

15. That upon receiving the aforesaid Telephonic call PetitionerNo.2 visited the house of Respondent No.4 but Respondent No.4 did not allow Petitioner No.2 to meet Petitioner No.1. D

16. That the petitioner No.2 again visited respondent No.4 to meet his son Aryan (Petitioner No.1) in the month of May, 2011 but respondent No.4 did not allow petitioner No.2 to meet petitioner No.1 upon which petitioner No.2 requested respondent No.4 either to send petitioner No.1 with him or allow him to meet petitioner No.1 then respondent No.4 became angry and called her associates who misbehaved with the petitioner No.2 and threatened him with dire consequences." E
F

14. Other relevant statements made in the criminal application filed by the 1st respondent before the Bombay High Court reads as follows: G

"2. The Applicants state that the marriage of the Applicant no.1 was solemnized on 20.04.2011 with the Opponent no.1 at Allahabad as per the Hindu rites and customs. The H

A Applicant no.1 states that out of the said wedlock there is
 a son named Aryan aged 7 years. The Applicants state
 that the said marriage was an arranged marriage. The
 Applicants state that the Opponent no.1 wife resided at the
 matrimonial house from the date of the marriage, however
 B in a strange full and lonely manner with the Applicant no.1
 in absence of the marital obligations and responsibilities.
 The Applications state that the Opponent no.1 failed to
 perform her marital relations prudently. The Opponent no.1
 on her own left the matrimonial house at Allahabad on
 C 02.02.2004 along with the son Aryan and proceeded to
 stay with her parents at Bhiwandi, Dist-Thane.

3. The Applicants state that since then i.e. 02.02.2004
 there was no physical relation between the Applicant no.1
 and Opponent no.1 resulting the same in cruelty towards
 D the present Applicant no.1. The Applicants state that along
 with the cruelty to Applicant no.1 the behaviour of the
 Opponent no.1 was coupled with absolute disregard and
 disrespect to the other family members of the Applicant
 no.1. The Opponent no.1 used to daily dig out quarrels with
 E the family members of Applicant no.1 and always gave an
 insulting treatment to them.

4. It would be appropriate to mention that prior to leaving
 the matrimonial house on her own on 02.02.2004, the
 Opponent no.1 disclosed to the present Applicant no.1 that
 F the said marriage of herself was forcefully performed
 against her wishes. The Applicant no.1 went under
 tremendous shock and depression on the Opponent no.1
 leaving the house on such grounds after about 3 years of
 the marriage. However, on frequent visits by the Applicant
 G no.1 to the parental home of Opponent no.1 at Bhiwandi
 with a view to bring back the Opponent wife to the
 matrimonial house at Allahabad, the Opponent no.1 on
 every occasion flatly denied to resume back along with the
 Applicant no.1 at Allahabad."
 H

RASHMI AJAY KR. KESHARWANI & ANR. v. AJAY 1161
KR. KESHARWANI AND ORS.

Though the son is residing with his mother since his birth, in the petition for habeas corpus, the son has been shown as the 1st petitioner along with the 1st respondent (husband), while the 1st appellant-wife has been shown as the respondent No.4 with Allahabad address, as quoted hereunder: A

"1. Aryan(Minor) through his father Ajay Kumar Kesharwani resident of House No.249 Chak Zero Road, Police Station Kotwali, District Allahabad. Presently Resident of House No.849, Mutthiganj, Arya Kanya Chowraha Road, Police Station Mutthiganj, District Allahabad. B C

2. Ajay Kumar Kesharwani son of Shri Santosh Kumar Kesharwani Resident of House No.249, Chak Zero Road, Police Station Kotwali, District Allahabad. D

... Petitioners

Versus

1. State of U.P. Through Principal Secretary Ministry of Homes Government of U.P. Lucknow. E

2. D.I.G./S.S.P. Allahabad..

3. Station House Officer, Police Station Mutthiganj, District Allahabad. F

4. Smt. Rashmi Ajay Kumar Kesharwani Wife of Ajay Kumar Kesharwani daughter of Sri Purshottam Kesharwani Resident of House No. 849, Mutthiganj, Arya Kanya Chowraha Road, Police Station Mutthiganj, District Allahabad. G

... Respondents"

15. The 1st respondent misled the Court with a view to obtaining an ex parte order will be evident from two different addresses of the 1st appellant(wife) shown in the two different H

A petitions which were filed simultaneously in the month of April and June 2011. Though the son is residing with the mother, at Bhiwandi, Thane, Maharashtra, as is evident from the statement made by the 1st Respondent, an allegation has been made that the son has been illegally detained by his mother.

B 16. In the case of *Capt. Dushyant Somal vs. Smt. Sushma Somal and others* reported in (1981) 2 SCC 277 this Court held that a writ of habeas corpus is not to be issued in the matter of course, particularly when the writ is sought against a parent for the custody of a child. For the reason aforesaid, we hold
C that the impugned order of issuance of the non-bailable warrant dated 9th November, 2011 passed by the Allahabad High Court was uncalled for and illegal and in the absence of any merit, the Habeas Corpus Writ Petition No.36326 of 2011 is
D withdrawn from the Allahabad High Court to this Court and is dismissed. The appeal is allowed.

K.K.T.

Appeal allowed.