Capt. Dushyant Somal

Vs

Smt. Sushma Somal and Another

Criminal Appeal No. 12 of 1981

Capt. Dushyant Somal

Vs

Smt. Sushma Somal and Others

Special Leave Petition (Criminal) No. 1 of 1981

(O. Chinnappa Reddy, Baharul Islam JJ)

18.02.1981

JUDGMENT

CHINNAPPA REDDY, J. -

1. The appellant-petitioner, in the criminal appeal and special leave petition, Capt. Dushyant Somal married Sushma Somal on May, 10, 1973. A daughter Sweta born on May 16, 1974 and a son Sandeep born on April 1, 1975 are the children of the marriage. There was estrangement between husband and wife and they appear to have been living separately since 1976. The children were living with the mother. On an allegation that Sandeep was removed from her custody by her husband in September 1977, the wife moved an application under the Guardians and Wards Act seeking custody of her minor son Sandeep. She obtained an ex parte order and pursuant to the order obtained by her, with the held of the police, she recovered custody of her son Sandeep. According to the wife on October 27, 1980, at about 7 a. m. when Sandeep escorted by his grandmother Shanti Devi was waiting at the bus stop, Capt. Dushyant Somal accompanied by three or four other persons came in a car and forcibly took away the child. At the time Sushma somal was helping her daughter to board as bus to go to school After Sweta boarded the bus she came towards the place where her son was to board the bus. She found her mother shouting for help. On enquiry she was told about the kidnapping. She immediately rang up the Police control Room and gave a report. The police registered a case under Section 363, Indian Penal Code against her husband, having searched in vain at various places for her son she finally filed an application under Article 226 of the Constitution in the Delhi High Court for the issue of a writ of habeas corpus directing her husband to produce her son. In answer to the rule nisi issued by the court the appellant-petitioner filed a counter-affidavit denying that he had ever kidnapped the child. According to him the entire case had been fabricated to forestall any application by him under the Guardians and Wards Act seeking the custody of his son on the ground that he and completed five years and therefore, as father, he was entitled to the custody of the son. Various preliminary objections were raised regarding the maintainability of the petition. The preliminary objections were overruled. As the appellant had denied the removal of the child, the high Court decided to examine witnesses. On the side of the wife, she examined herself and her mother. The husband did not examine himself as a witness not did he examine anyone else

on is side. He did not also choose to cross-examine his wife and her mother and held that Sandeep had been 'unauthorisedly taken away' from the lawful custody of his mother by his father and that he was being kept under illegal detention by the father. A Writ was issued to the appellant directing custody of the child before the court on December 17, 1980, so that the of the court the appellant did not produce the child. The High Court came to the conclusion that the appellant was clearly guilty of contempt of court and accordingly directed him to be taken into custody and detained in a civil prison until he produced the child in the court. Criminal Appeal 12 of 1981 has been filed against the order of the Delhi High Court committing the appellant to prison for contempt of court. Special Leave petition 1 of 1981 is directed against the order of the High Court in the application under Article 226 of the constitution.

2. Shri Yogeshwar Prasad, learned counsel of the appellant-petitioner argued that the appellant ought not have been committed to prison for alleged contempt of court, when the direction of the court that he should produce. He submitted that having regard to the pendency of the prosecution under the Section 363 of the Indian Panel Code, the High Court should not have issued a writ of habeas corpus of the production of the child. He further submitted that the case against the appellant had not been established beyond reasonable doubt and therefore, he should not have been convicted and sentenced to be detained in the civil prison. Having regard to the pendency of the criminal case the appellation could not himself give evidence in the proceeding under article 226 nor could he disclose his defence by cross-examining the witnesses examined by his wife. He did not go into the witness-box himself and did not cross=examine the witnesses examined by his wife because of the protection given to him by Article 20(30 of the Constitution. It was also suggested that there was violation of Article 20(2). Another submission was that the wife should have sought her remedy under the Guardians and Wards Act and not by moving and application under Article 226 of the Constitution. In any case, it was submitted that the High Court was wrong in sentencing him to an indefinite term of imprisonment which may even exceed the maximum prescribed by the Contempt of Courts Act.

3. There can be no question that a writ of habeas corpus is not to be issued as a mater of curse, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punishing for contempt of court for disobeying an order of the standard of proof being similar, even of not the same, as in a criminal proceeding. Where the person alleged to be in content is able to place order, the court ill not be justified in punishing the alleged contemner. But all this does not mean that a writ of habeas corpus cannot or will not be issued against a parent who which impunity snatches away a child from the lawful custody of the other parent, to whom a court has given such custody. Nor does it mean that despite the contumancious conduct of such a parent in not producing the has was not token away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grandmother of the child was not subjected to any cross-examination; the appellant-petitioner did to choose to go into the witness-box; he did not choose to examine any witness on his behalf. The evidence of the grandmother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was was waiting for a bus in the company of his grandmother. The High Court was quite right in coming to the conclusion that the appellant-petitioner had taken away the held unlawfully from the custody of the child's mother. The writ of habeas corpus was, therefore, tightly issued. In the circumstance, on the finding, impossibility of obeying the order was not an excuse which could be properly out forward.

4. The submission made in behalf of the appellant-petitioner that a petition for the issue of the writ of habeas corpus was not appropriate in case when he was also charged with a criminal offence, in

respect of the very person in respect of whose custody the writ was sought is without substance. In support of this submission reliance was placed upon the following observation of Hidayatullah, J. in Mohd, Ikram Hussain v. state of U. P. : ' It is of course singularly inappropriate in cases where the petitioner himself is charged with a criminal offence in respect of the very person for whose custody he demands the writ." It is obvious that the Submission what was observed by Hidayatullah, J. What Hidayatullah, J. pointed out was that it would be inappropriate to issue a writ at the instance of a person against whom an offence was alleged, in respect of the person detained. Hidayatullah, J.'s observation was about the issue of the writ to a person against whom an offence was alleged.

5. It was submitted that the appellant-petitioner did not give evidence, he did not examine any witness on his behalf and he did not cross-examine his wife and mother-in-law because, he would be disclosing his defence in the criminal case, if he so did. He could not be compelled to disclose his defence in the criminal case in that manner as that would offend against the fundamental right guaranteed by Article 20(3) of the constitution. It unlawfully inquired into in the criminal case where he was facing the charge of kidnaping. It was argued that on that ground alone the writ served. In answer to the rule nisi, all that he was required to do was to produce the child court, of the child was in his custody. If after producing the child, he wanted to retain the custody of the child, he would have to satisfy the court that the child was lawfully in his custody. there was no question at all of compelling the appellant-petitioner to be a witness against himself. He was free to examine himself as a witness or not. If he examined himself he could still refuse to answer questions, answer to which might incriminate him in pending prosecutions. He was also free to examine or not other witnesses on his behalf and to cross-examine or not, witnesses examined by the opposite party. Protection against testimonial compulsion did not convert the position of a person cause of an offence into a position criminal prosecution was not a or tress again all other action contemplate by law. A criminal prosecution was not a fortress again all other actions in-law. To accept the position that the pendency of a prosecution was a valid answer to a rule for habeas corpus would be to subvert the judicial process and to mock at the criminal justice system. All that Article 20(3) guaranteed was that a person accused of an offence shall not be compelled to be a witness against him-compulsion self, nothing less and, certainly, nothing more. Immunity against testimonial compulsion did not extend to refusal to examine and cross-examine witnesses and it was not open to a party proceeding to refuse to examine himself or anyone else as a witness on his side and to cross-examine the witnesses of the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to the opposite party on the basis of the evidence adduced by the other party. We are unable to see how Article 20(3) comes into the picture at all.

6. It was also sought to be made out that there was a violation of Article 20(2) of the constitution. Apart from the fact that the criminal case his not concluded and there has yet been no conviction and punishment for the alleged offence of kidnapping, we do not also understand how a procession and punishment for the offence of kidnapping can stand in the way of the appellant being punished for contempt of court.

7. It was argued that the wife had alternate remedies under the Guardians and Wards Act and the Code of Criminal Procedure and so a writ should not have been issued. True, alternative remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a court, the fact certainly cries out that a prerogative writ shall issue. In regard to the sentence, instead of the sentence imposed by the High Court, we substitute a sentence of three months' simple imprisonment and a fine of ropes five hundred. The sentence of imprisonment or such part of it as may not have been served will stand remitted on the appellant-petitioner producing the child in the High Court. With this modification in the matter of

sentence, the appeal and the special leave petition are dismissed, Criminal miscellaneous petition 677 of 1981 is dismissed as we are not satisfied that it is a fit case for laying a complaint.

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