

Rashmi Ajay Kr. Kesharwani & Another

v.

Ajay Kr. Kesharwani & Others

(Supreme Court Of India)

HON'BLE MR. JUSTICE G.S. SINGHVI HON'BLE MR. JUSTICE  
SUDHANSU JYOTI MUKHOPADHAYA

Criminal Appeal No. 518 Of 2012 (Arising Out Of Slp(Crl.) No. 9113 Of 2011)  
| 12-03-2012

1. Leave granted.

2. Ist appellant-Rashmi is the wife and 2nd appellant- Aryan is the son of the Ist respondent-Ajay Kumar. The Ist appellant and the Ist 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.

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 Ist appellant to ensure her presence and the production of the 2nd appellant.

3. According to the Ist appellant, since her marriage, she was constantly subjected to mental and physical torture by the Ist 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 Ist 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 Ist appellant-Rashmi along with her son took shelter at her parent's home at Biwandi, District Thane, Maharashtra.

4. The Ist 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.

5. The Ist 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.

6. The Ist 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 Ist 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 Ist respondent-husband to pay arrears of Rs.4,90,000/- towards maintenance. According to the Ist appellant-wife, the Ist respondent-husband has not yet paid any amount towards maintenance and is in default of the Court's order.

7. A Miscellaneous Application No.743/2010 has been filed by the Ist 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 Ist respondent-husband and others. The Court of the Judicial Magistrate First Class, Bhiwandi in Criminal Case No.1013/2010 has noticed that the Ist respondent has already appeared before the Court at Bhiwandi.

8. On 27th April, 2011 the Ist 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 Regular Criminal Case No.1013/2010 by the 4th Judicial Magistrate First Class,

Bhiwandi. In the said case, the Ist respondent-husband has shown the address of Ist appellant-wife as follows:

“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.”

Though on 27th April, 2011 the Ist 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 corpus under Section 226 of the Constitution of India showing the Ist appellant-wife as residing at Allahabad with the following address:

“Smt. Rashmi Ajay Kumar Keshwani

Wife of Ajay Kumar Keshwani daughter of Sri Purshottam

Keshwani Resident of House No.849, Mutthiganj, Kanya

Chowraha Road, Police Station Mutthiganj, District

Allahabad.”

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 Ist appellant having come to know of the case engaged a lawyer, who failed to appear. On 9th November, 2011, the learned Single Judge issued a non-bailable warrant against the Ist appellant-wife (respondent No.4) through C.J.M., Allahabad 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 to the Ist respondent and stayed the operation of the impugned non-bailable warrant. Notice was duly served on the Ist 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 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 Ist respondent in the different writ petition and applications and also to the pleading made by the Ist 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 filed by the Ist 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. 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 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 Master Aryan petitioner No.1 and went away to her parents home and since then she did not return back.

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.

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.

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.

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.

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.

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.

13. That it is further very important to mention here that 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.

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.

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

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.”

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

“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 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 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 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 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 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 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 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.”

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

“1. Aryan(Minor) through his father Ajay Kumar Keshewani 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.

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

... Petitioners

Versus

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

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

3. Station House Officer,

Police Station Mutthiganj, District Allahabad.

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

... Respondents”

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

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 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 withdrawn from the Allahabad High Court to this Court and is dismissed.

17. The appeal is allowed.