

BOMBAY HIGH COURT

Mahomedalli Allabux

Vs.

Ismailji Abdulali

(Macleod, J.)

02.02.1926

JUDGMENT

Macleod, J.

1. Ismailji Abdulali, the father of three children under the age of eighteen, viz., Amina, Hussena, and Mariana, applied to this Court, under the provisions of Section 491 of the Criminal Procedure Code, for an order for the production of the children against Sardar Syedna Taher Saifuddin Mullaji Saheb. A rule nisi was issued for the production of the minors, and when the matter first came on for hearing, Mariam, the youngest of the three sisters, was actually before the Court, and there being no question between the parties with regard to the proper custody of Mariam, the Judge ordered Mariam to be entrusted to the custody of her father.

2. On the affidavits it appeared that the other two children were outside the limits of the appellate jurisdiction of this Court, so the Judge allowed the petition, to be amended by making it clear that it was a petition not only under Section 491, Criminal Procedure Code, but also for the common law power of this Court to issue a writ of habeas corpus. Mahomedali Allabux was added as Respondent No. 2 and the rule was served upon him.

3. We are not concerned with the facts of the case for the purpose of this appeal. It is only necessary to mention that the petitioner had some time ago handed over the custody of his daughters to the first respondent, and that he was now anxious to get back possession of his children. The rule was discharge against the first respondent, and made absolute against the second respondent, and it was further ordered that he should produce in Court or in Chambers the minors, Amina and Hussena, on January 18, 1926.

4. Many points were raised before the learned Judge, but only two points have been taken before us in appeal, viz., (1) whether the powers granted to this Court by the Charter of 1823 have been abrogated by the provisions of Sections 491 and 491-A of the Criminal Procedure Code; and (2) what is the extent of the power of this Court under, the habeas corpus jurisdiction granted by the

Letters Patent. But a preliminary point was taken by the respondents that no appeal lay from the order of the learned Judge, That was in effect an order directing a writ of habeas corpus to issue.

5. It was contended that, under Clause 15 of the Charter of 1865 as amended in 1919, no appeal lies from an order of one Judge of the High Court "in the exercise of criminal jurisdiction," and that the order made in this case was such an order. In Clause 15 of the Charter before the amendment the words were "not being a sentence or order passed or made in any criminal trial." In my opinion, it is extremely doubtful whether any restriction on the rights of appeal from the judgments of a single Judge of the High Court was intended to be made by the substitution for those words of the words "in the exercise of criminal jurisdiction." However that may be, I do not think that it can be said that the order of the Judge directing a writ of habeas corpus to issue was an order made in "the exercise of criminal jurisdiction." The sole foundation for that argument is that the office of the High Court, which concerns itself with the issue of such a writ, is the office of the Clerk of the Crown.

6. In In the matter of Narrondas Dhanji [1890] 14 Bom. 555, an application was made under Section 491 Criminal Procedure Code; when the application was refused an appeal was filed, and Sargant, C.J., said (p. 557):-

The petitioner seeks to appeal from an order discharging the rule which she obtained on the 2nd April. That rule calls upon Dossa Jewan to show cause why the minor Narrondas Dhanji should not be delivered to the petitioner. The question raised by it, therefore, as between the parties is as to the right to the possession of the child. That question was discussed at the argument of the rule, and the Judge decided it against the petitioner, holding that she was not entitled to the child, and he discharged the rule which she had obtained.

We think that this order of discharge was a judgment within the meaning of the words in Clause 15 of the Letters Patent 1865. The judgment there; mentioned is not necessarily a final judgment. That is clear from the express use of these words in Clause 39. But the order of the 2nd May was certainly a decision or determination affecting the rights of the petitioner, and is a judgment within the definition of that term which we adopted in *Sonbai v. Ahmedbhai Habibhai*¹

7. We think, therefore, that the appeal is competent.

8. By the Charter of 1823 there was given to the Chief Justice and Puisne Justices of the Supreme Court such jurisdiction and authority as Justices of the Court of King's Bench had, and might lawfully exercise, within that part of Great Britain called England as far as circumstances would permit. The High Court still retains such powers as were granted by the Supreme Court Charter of 1823, as were not inconsistent with the Charter of 1865 or have not been taken away by Subsequent legislation. It was argued that the Legislature, by enacting Section 491 of the

Criminal Procedure Code, limited the common law powers which the High Court had with regard, to the issue of writs of habeas corpus. The question is only important because in this case the children, whom the respondent is asked to produce are not only outside the limits of the appellate criminal jurisdiction of this Court, but are even outside British India. Assuming for a moment that this Court has under its common law powers jurisdiction to issue a writ for the production of a person outside British India, provided it is satisfied that he is in the custody or control of a person within its jurisdiction it cannot be said that Section 491 directly deprived the High Court of that jurisdiction.

¹[1872] 9 B.H.C. (A.C.) 398

9. The appellant's counsel was, therefore forced to argue that because certain of the common law powers already possessed by the High Court were expressly-granted by an enactment of the Indian Legislature, it must necessarily follow that the rest of those powers which were not expressly so granted were thereby withdrawn. We cannot accede to that argument. In my opinion it would not be possible to deprive this Court of any powers granted to it by its Charter except by direct legislation.

10. Then the next question is, whether the High Court under its common law powers which gave a jurisdiction to issue writs of habeas corpus, had jurisdiction in this case to issue a writ. In the case of *Barnardo v. Ford*² which is a direct authority on the point, the head-note says:

On an application, by the parent for a writ of habeas corpus in repeats of a child, directed to the head of an institution for destitute children in which the child had been placed, it appeared that before the proceedings began lie had without authority from the parent handed over the child to another person to be taken to Canada, and he alleged that he did not know the address of such person or where he or the child was. The Court of appeal affirmed an order absolute of the Queen's Bench Division that the writ should issue.

11. It was held by the House of Lords, affirming the decision of the Court of Appeal, but without expressing any opinion as to the circumstances under which the child was sent to Canada, that the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ in order that the facts might be more fully investigated.

12. It was not suggested before the learned Judge in the Court below, that, when the application for a rule was made, the children were not within the custody of the respondent. So that this is not a case in which a person in whose custody the children were at one time had, before notice of the application for a writ, ceased to have any custody or control over the children alleged to be detained. We are not concerned with the events which have happened since Mr. Justice Shah made the order now under appeal. It would be for him to consider on the return of the writ whether it is satisfactory or not. In *Barnardo v. Ford*³ it does not appear that the appellant made any attempt in the course of the argument to suggest that the fact that the child had been taken to

Canada was any obstruction to the exercise of the jurisdiction of the Court. It is obvious that if that had been a ground for depriving the Court of its jurisdiction, the point would have been taken, and from the report of the arguments it would appear that it was conceded on all sides that even though the child was in Canada, the Court had jurisdiction.

13. Certain remarks of Lord Herschell in giving judgment are extremely pertinent to the circumstances of this case. His Lordship first dealt with the contention which had been raised that no appeal lay from an order that a writ of habeas corpus should issue. It had been pointed out that a rule or order calling on a person to show cause why a writ of habeas corpus should not issue was of modern origin, that application for the writ was formerly made *ex parte* and that the service of the writ was the first step which affected

²[1892] A.C. 326

³[1892] A.C. 326

the party alleged to be detaining another in illegal custody, and it was contended that the order made by a Court or Judge that a writ of habeas corpus should issue was not a 'judgment or order' within the meaning of the appeal section of the Judicature Act. But his Lordship did not think there was any difficulty in holding that an order for the issue of a writ of habeas corpus, even when made *ex-parte*, was an 'order' within the purview of the appeal section of the Judicature Act. After referring to the decision in *Reg. v. Barnardo*⁴ and after expressing his disapproval of the law as laid down therein, his Lordship continued (p. 339).

But the question remains whether, even assuming that the decision in *Beg v. Barnardo, Tye 's Case* was not well founded, the appellant is entitled to have the order that the writ should issue discharged. I have already given my reasons for thinking that this House cannot reject as incompetent an appeal against an order for the issue of a writ of habeas corpus; but I feel most strongly, that such appeals are not to be encouraged, Where any tribunal believes That a parson is or may be under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no Court of Appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the Court entertains a doubt whether this be the tact, it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it. Now, it is impossible to read the judgment of the Lord Chief Justice seeing that he did entertain such a doubt, and that he was not prepared upon the affidavits to accept as conclusive the statements of the appellant. At your Lordships' bar the counsel for the respondent contended that they had a right to cross-examine the appellant and that the proper occasion on which to try the question was when he had returned to the writ that he was not detaining the child, and that it was not at the time the writ was issued, in his custody, power or control. I think this view is the correct one; the truth of the return may, no doubt,

be put in issue, and I feel myself unable to advise your Lordships that the Queen's Bench Division were not in point of law justified in issuing the writ. I must not be understood as indicating that I think the story told by the appellant is untrue. But, as the matter is to undergo further investigation, it would obviously be improper to enter upon any discussion of the statements contained in the affidavits, or to express any opinion upon them. I come to this conclusion with some regret, as the question intended to be raised by this appeal is one of no small importance. But, in my opinion it was premature to raise it at the present stage, and I think it very important not to set a precedent which might prove prejudicial to the liberty of the subject of which the writ of habeas corpus is the most effectual safeguard.

14. Every word of that passage in the judgment I have read is pertinent to the present case. Certainly, there was every justification for the Judge directing the issue of a writ, and it is only on the return of the writ that these questions, which were sought to be raised before the learned Judge, can be dealt with.

⁴[1889] 23 Q.B.D. 305

15. I think, then, that this appeal must be dismissed with costs.

Coyajee, J.

16. I am of the same opinion.

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