

CASE NO.:
Appeal (crl.) 520 of 2001

PETITIONER:
SYED SALEEMUDDIN

Vs.

RESPONDENT:
DR.RUKHSANA & ORS.

DATE OF JUDGMENT: 19/04/2001

BENCH:
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

D.P.MOHAPATRA, J.

Leave granted.

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The appellant is the husband of the respondent no.1. They were married on 7.12.1993. They have two children, a daughter named Ayesh Fathima aged 6 years and a son named Sayeed Zaiduddin aged 5 years. The appellant is a businessman and the respondent No.1 is a doctor practising Ayurvedic medicine. On 26th March 2000, the respondent no.1 sustained burn injuries when she was in her house. On the next day she was admitted in Princess Duru Shehvar Children & General Hospital, Hyderabad. On receiving intimation from the incharge of the hospital Sub-Inspector Ravindra of the Police Station Habeeb Nagar went to the hospital and recorded the statement of the respondent. The said statement was registered as FIR No.54/2000 on 28th March 2000 at 7.30 p.m. with Habeeb Nagar Police Station.

Thereafter on 10.4.2000 the first respondent filed a writ petition, writ petition No.6017/2000, in the High Court of A.P. with the following prayer :

For the reasons and in the circumstances stated in the accompanying Affidavit, the petitioner herein prays in the interests of justice, that this Honble Court may be pleased to issue an order or direction more in the nature of Writ of Habeas Corpus, directing the release of the petitioners minor children namely Ayesh Fathima and Syeded Zaiduddin who are under the custody of the 3rd respondent at present and set them at liberty and pass such other and further order or orders as this Honble Court may deem fit and proper in the circumstances of the case.

The State of Andhra Pradesh represented by its Principal Secretary (Home) Police Department, the Station House Officer of Habeeb Nagar Police Station and Syed Saleemuddin, the appellant herein, were cited as the respondents 1 to 3 respectively in the writ petition. In the writ petition, the respondent No.1 sought intervention of the Court for

getting custody of the children who were then living with their father, the appellant. The High Court by its order dated 12.4.2000 directed the SHO Habeeb Nagar Police Station to produce the appellant along with two children before the Court on 17.4.2000 at 10.30 a.m. In compliance with the said order the appellant and the two children were produced before the Court on the date fixed. On the same day the High Court directed the Metropolitan Sessions Judge, Hyderabad along with the Secretary of the Andhra Pradesh High Court Legal Services Committee to go to the hospital and meet respondent no.1. The Sessions Judge in compliance with the said order went to the hospital and recorded the statement of the respondent no.1.

The High Court disposed of the case by the judgment rendered on 18.4.2000. In para 3 of the judgment it is stated that the Habeas Corpus petition was moved at the instance of the maternal uncle of the children i.e. the younger brother of Dr. Rukhsana Saleem stating that it was a case of dowry harassment and consequent attempt of the appellant to kill her by setting her afire by pouring petrol. In para 4 of the judgment the High Court took note of its order dated 17.4.2000 deputing the Metropolitan Sessions Judge and the Secretary of the Andhra Pradesh High Court Legal Services Committee to go to Princess Duru Shehvar Children & General Hospital, Hyderabad and examine the lady and also noted that the lady had given a detailed statement which was recorded by the Metropolitan Sessions Judge. As noted in the judgment of the High Court the lady also stated that the previous statement recorded by the S.I. of Police Ravindra was made under threat. In paragraph 5 of the judgment the High Court discarded the report of the Sub-Inspector of Police, Habeeb Nagar Police Station, Ravindra. Paragraphs 6 to 10 in which directions given by the High Court to different authorities of the State are quoted hereunder:

6. Having given our anxious consideration to the matter, we direct the Station House Officer of Women Police Station, CCS, to register the statement which is being handed over as FIR by giving the appropriate Crime number and then investigate into the matter and take necessary action in accordance with law.

7. In so far as the custody of the children is concerned, we direct that the same shall remain with the mother, namely, Dr. Rukhsana Saleem, and temporarily with the deponent of the third party affidavit i.e. Mr. Irfanulla, and we feel that Mr. Irfanulla, who is no other than the maternal uncle of the children will take care of them. But Mr. Irfanulla has to summon his mother from Dubai as promised by him within two days, so that she takes care of not only the children but also Dr. Rukhsana Saleem, being a lady and laid up with burn injuries. We also direct the Superintendent of Princess Duru Shehvar Children's & General Hospital, Hyderabad to allocate a special room to Dr. Rukhsana Saleem and whenever she wants to see the children, the children be taken to her by Mr. Irfanulla.

8. Dr. Rukhsana Saleem was a Practicing Doctor in Ayurveda and she was earning considerable income. Now she became temporarily incapacitated because of the burn injuries sustained by her. Mr. Syed Saleemuddin, who is the 3rd respondent herein, is directed to deposit an amount of Rs.1.00 lakh with the Registrar (Judicial) in four

instalments and the first of such instalments shall be made within one week and the rest of the installments one week each thereafter. The Registrar (Judicial) then will ask the Superintendent of Princess Duru Shehvar Children's & General Hospital, Hyderabad as to the expenses incurred in the treatment of Dr. Rukhsana Saleem and after meeting the same, the remaining amount shall be paid over to Dr. Rukhsana Saleem. If the amount as ordered above is not deposited, then the Registrar (Judicial) shall transmit the file to the Court of the Chief Judge, City Civil Court, who shall execute this order as a decree under the provisions of the Code of Civil Procedure as also the Civil Rules of Practice and if necessary by causing arrest of the 3rd respondent.

9. For the reasons stated above, we direct the Commissioner of Police to initiate appropriate disciplinary proceedings against Mr. Ravindra, S.I. of Police, Habeeb Nagar Police Station, Hyderabad and then Enquire into the matter after affording opportunity to him and dispose of the same within a period of four months from the date of receipt of a copy of this order.

10. Liberty for the 3rd respondent to file petition before the Family Court, Hyderabad to visit the children, after a period of one month. The writ petition is accordingly disposed of.

This judgment is under challenge in this appeal filed by the father of the children by special leave. Shri M.N.Rao, learned senior counsel appearing for the appellant submitted that the High Court has seriously erred in travelling beyond the scope of the enquiry in the Writ Petition. Shri Rao contended that the writ petition was filed seeking a writ of Habeas Corpus and for transfer of custody of the two children from their father to their mother. For deciding the case it was not necessary for the High Court to embark on an inquiry about the recording of the statement of the injured; nor was it relevant for the purpose of the case to deal with the question relating to investigation by the police. It is relevant to note here that by the date of filing of the writ petition FIR No.54/2000 had already been registered at Habeeb Nagar Police Station on the basis of the statement of the respondent no.1 recorded by the S.I. of Police, Ravindra. Shri Rao fairly submitted that the appellant has no objection if the children are left in the custody of the respondent No.1 till the Family Court considers the petition filed by the appellant for their custody. Shri Rao also fairly stated that the appellant has paid certain amount for treatment of the respondent No.1 at the Princess Duru Shehvar Children & General Hospital, Hyderabad and is willing to pay the entire expenditure for her treatment at the hospital.

Shri P.S.Narsimha, learned counsel appearing for the respondent No.1 strenuously urged that this Court should not interfere with the judgment/order under challenge. The High Court has merely directed the police to register an FIR on the basis of the subsequent statement of the respondent No.1 recorded by the Metropolitan Sessions Judge, Hyderabad and investigate into the matter. He further submitted that in pursuance of the directions contained in the Judgment under challenge the Police has registered Crime No.108/2000 and recorded the statement of some persons. According to Shri Narsimha the order passed and the directions issued by the

High Court are within its power and jurisdiction while dealing with the Habeas Corpus petition, and therefore, no interference with the Judgment is warranted.

A Constitution Bench of this Court in the case of Kanu Sanyal vs. District Magistrate, Darjeeling and others (1973 (2) SCC 674) dealing with the nature and scope of a writ of Habeas Corpus observed :

It will be seen from this brief history of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detailed is directed in order that the circumstances of his detention may be inquired into, or to put it differently, in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint. The form of the writ employed is We command you that you have in the Kings Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf. The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), the essential and leading theory of the whole procedure is the immediate determination of the right to the applicants freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end.

This Court in the case of Gohar Begam v. Suggi Alias Nazma Begam and others (1960(1) SCR 597) dealt with a petition for writ of Habeas Corpus for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan Law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. This Court further held that in issuing writs of Habeas Corpus the Court have power in the case of an infant to direct its custody to be placed with a certain person.

From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal

consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children.

Coming to the observation made by the High Court discarding the statement of the respondent recorded by the Sub-Inspector of the Habeeb Nagar Police Station, Ravindra and the directions to the SHO of the said Police Station to register statement recorded by the Metropolitan Sessions Judge Hyderabad as FIR is clearly unsustainable. No reason has been given by the High Court in the order as to why the previous statement recorded by the Police Officer should be discarded. Since the information about the incident had already reached the police and on getting the said information the Police Officer visited the hospital and recorded the statement and FIR No.54/2000 had already been registered on the basis of that statement that is to be treated as the FIR in the case and any subsequent statement made by the informant/complainant can only be taken as a statement in course of the investigation. No reason is stated and we are at loss to understand why the High Court felt that the unusual and extraordinary step of asking the Metropolitan Sessions Judge accompanied by another Judicial officer the Secretary of the Andhra Pradesh High Court Legal Services Authority, should be directed to record the statement of the injured. The case as noted earlier was one relating to custody of children for disposal of which neither was it necessary for the High Court to take such an unusual step nor was the matter relating to investigation into the criminal case relevant for deciding the case. The procedure followed by the High Court does not commend us.

From the conspectus of the discussions made and the reasons stated in the aforementioned paragraphs, it is clear that the order of the High Court is unsustainable and has to be vacated. Accordingly, the appeal is allowed and the judgment/order of the High Court dated 18.4.2000 in W.P.No.6017/2000 is set aside. In view of the fair concessions made by Shri M.N.Rao, learned senior counsel appearing for the appellant, it is ordered that the custody of the two children will remain with their mother, who is respondent no.1 herein, till the Family Court disposes of the petition filed by the appellant for their custody. It is further ordered that the appellant shall pay the amount spent for treatment of the respondent no.1 in Princess Duru

Shehvar Children & General Hospital, Hyderabad. If any amount is yet to be paid, the appellant shall pay the same within one month. In the circumstances of the case, there will be no order for costs.

JUDIS