GOHAR BEGAM

v.

SUGGI ALIAS NAZMA BEGAM AND OTHERS

(JAFER IMAM, A. K. SARKAR and K. N. WANCHOO, JJ.)

1959

August 27.

Habeas Corpus—Application for recovery of child—Duty of Court—Alternative remedy, if a bar—Principles applicable—Criminal Procedure Code, 1898 (V of 1898), s. 491.

An unmarried Sunni Muslim mother of an illegitimate female child made an application under s. 491 of the Code of Criminal Procedure for the recovery of the child from the respondents.

Held, that under the Mohammedan Law the mother of an illegitimate female infant child is entitled to its custody. 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 s. 491 of the Criminal Procedure Code. A dispute as to the paternity of the child is irrelevant for the purpose of the application. The Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised.

Held, also, that before making the order for the custody of the child the court is called upon to consider its welfare.

Held, further, that the fact that a person has a remedy under the Guardian and Wards Act, is no justification for denying him the remedy under s. 491 of the Criminal Procedure Code.

Held, further, that in issuing writs of *habeas corpus* the courts have power in the case of an infant to direct its custody to be placed with a certain person.

The Queen v. *Clarke*, (1857) 7 E.L. & B.L. 186 and *The King* v. *Greenhill*, (1836) AD & E. 624, relied on.

Zara Bibi v. *Abdul Razzak*, (1910) XII Bom. L.R. 891; *Subbuswami Gounden* v. *K. Kamakshi Ammal*, (1930) I.L.R. 53 Mad. 72 and *Rama Iyer* v. *Nata Raja Iyer*, A.I.R. 1948 Mad. 294, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 11 of 1959.

Appeal by special leave from the judgment and order dated April 30, 1958, of the Bombay High Court in Criminal Application No. 508 of 1958.

K. M. Desai and *I. N. Shroff*, for the appellant.

Ganpat Rai, for respondents Nos. 1 to 4 and 6.

K. L. Hathi and *R. H. Dhebar*, for respondent No. 5.

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1959. August 27. The Judgment of the Court was delivered by

SARKAR J.—The appellant is an unmarried Sunni Moslem woman. She has an infant female illegitimate child called Anjum. The appellant made an application to the High Court at Bombay under s. 491 of the Code of Criminal Procedure for the recovery of the custody of the child from the respondents. That the application was refused. Hence this appeal.

The appellant's case is as follows: She is the daughter of one Panna Bai. The respondent Kaniz Begum is Panna Bai's sister. Kaniz Begum, whom it will be convenient to refer as the respondent, took the appellant over from Panna Bai and brought her up. Prior to 1951 the respondent had put her in the keeping of two persons and had thereby made pecuniary gain for herself. In 1951 the appellant met one Trivedi and since then she was been living continuously in his exclusive keeping. The appellant stayed with Trivedi at Jabalpur up to 1954. On September 4, 1952, the child Anjum was born to her by the said Trivedi. In November 1953 she bore another child to him of the name of Yusuf *alias* Babul. In 1954 the appellant with her said two children, her mother who had been living with her, and Trivedi left Jabalpur and came to live in Bombay. After coming to Bombay, Trivedi for sometime lived with his relatives as he could not find independent accommodation. During this time, the appellant with her children and mother stayed with the respondent who was then living in Bombay, but Trivedi used to visit the appellant daily at the residence of the respondent. In January 1956 the appellant bore a third child to Trivedi called Unus *alias* Chandu. After the birth of Unus, Trivedi took the appellant, her mother and the two younger children to a hill station near Bombay called Khandala and the party stayed there for three or four months. At the time the appellant had gone to Kandala, the respondent went to Pakistan on a temporary visa and she took the child Anjum with her presumably with the consent of the appellant,

After returning from Khandala, Trivedi was able to secure a flat for himself in Marine Drive, Bombay and the appellant with her mother and two sons began to stay with him there. In April 1957 Trivedi moved into another flat in Warden Road, Bombay, with the appellant, her two younger children and mother and has since then been living there with them. After the respondent returned from Pakistan with Anjum, the appellant who had then moved into the flat in Marine Drive, asked the respondent to send Anjum to her but the respondent refused to do so. Since then the respondent has been refusing to restore the custody of the child Anjum to the appellant.

In these circumstances, the appellant made her application under s. 491 of the Code of Criminal Procedure on April 18, 1958. She stated that she apprehended that the respondent would remove Anjum to Pakistan any day and there was already a visa for Anjum available for that purpose. She also stated that in view of the relationship between the parties she had not earlier taken the matter to court. On the date of the application the respondent was away in Pakistan. She had not however taken the child Anjum with her but had left her in her flat at Bombay in charge of her cousin Suggi and an Aya, Rozi Bhangera. The appellant stated that the respondent had asked her sister Bibi Banoo and the latter's husband Mahomed Yakub Munshi to look after the child. The appellant had therefore made these four persons only the respondents to her application. Later, on the respondent's arrival back in Bombay, she also was made a party to the application. The other respondents contended in the High Court that they had nothing to do with the child and had been made parties to the application unnecessarily. They have not appeared in this appeal It is clear however that they did not make over the custody of the child Anjum to the appellant when the application was made and the affidavits filed by them leave no doubt that their sympathies are with the respondent Kaniz Begum. The state of Bombay was also made a respondent to the application, but that was a mere matter of form. The State has no interest

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in the case and has not taken any part in the proceedings.

The respondent opposed the application denying the correctness of some of the allegations made in the petition of the appellant. She denied that Trivedi was the father of the child Anjum and said that the father was a Shia Moslem called Samin Naqui. She said that the appellant's mother had given the appellant to her to bring up when very young as she had not the means to do so herself and since then the appellant had been living with her all along and left her flat in company with Trivedi only during her temporary absence in Pakistan in 1956. She denied that she had made the appellant live in the keeping of any person as alleged by the latter. She contended that she had intended that the appellant would marry and live a clean and respectable life but other influences operated upon her and she went to live with Trivedi as his mistress. She denied that she had prevented the appellant access to the child Anjum as the latter stated. She contended that she was looking after the child Anjum with great care and solicitude, and had put her in a good school and kept a special Aya for her. She also said that she was well off and had enough means to look after the child well. She contended that it was not in the interest of the child to live with the appellant because she was living in the keeping of a man who might turn her out and she would then have to seek the protection of another man. She said that she had no child of her own and was fond of Anjum whom she had been treating as her own child.

The learned Judges of the High Court observed that the case raised various controversial questions, specially as to the paternity of the child, as to whether the respondent had made the appellant live in the keeping of different persons and also as to whether she had prevented the appellant from having access to the to the child. The learned Judges observed that it was not the function of a court in an application under s. 491 to record findings on such controversial facts and that, in these circumstances, the proper forum for the appellant was to move a civil court under the

Guardian and Wards Act for the custody of the child. The learned Judges further observed that they were *prima facie* satisfied that the child was not illegally and improperly detained by the respondents. They therefore dismissed the appellant's application.

We are unable to appreciate the view the learned Judges of the High Court. It seems to us that the controversial facts referred to by them were wholly irrelevant to the decision of the application. We have not been able to find one single fact relevant to the issue in this case which is in controversy. The facts, which are abundantly clear and beyond dispute are these. The child Anjum is the illegitimate daughter of the appellant who is a moslem woman. The child was at the date of the application less than six years' old and now she is just over seven years old. The appellant is a singing girl by profession and so is the respondent. The appellant stated in her affidavit that the respondent was in the keeping of a man and this the respondent has not denied. It is not the respondent's case that she is a married woman leading a respectable life. In fact she admits that she allowed Trivedi to live in her flat with the appellant as his mistress and took money from him for "Lodging and Boarding Charges". Trivedi has sworn an affidavit acknowledging the paternity of the child and undertaking to bring her up properly as his own child. He is a man of sufficient means and the appellant has been for a considerable time living with him as his mistress.

On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of s. 491. This position is clearly recognised in the English cases concerning writs of *habeas corpus* for the production of infants.

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In *The Queen* v. *Clarke*(1) Lord Campbell, C. J., said at p. 193:

> "But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of s. 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that that view is unsustainable in law.

Before making the order the court is certainly called upon to consider the welfare of the infant concerned. Now there is no reason to think that it is in the interest of the child Anjum to keep her with the respondent. In this connection it is relevant to state that at some stage of the proceedings in the High Court the parties appeared to have arrived at a settlement whereby it had been agreed that the child Anjum would be in the custody of the appellant and the respondent would have access to the child. The learned Judges of the High Court however were not prepared to make an order in terms of this settlement because, as they said, "It did not appear to be in the interest and welfare of the minor". Here again they give no reason for their view. Both parties belong to the community of singing girls. The atmosphere in the home of either is the same. The appellant as the mother can be expected to take better care of the child than the respondent. Trivedi has acknowledged the paternity of the child. So in law the child can claim to be maintained by him. She has no such right against the respondent. We have not been able to find a single reason how the interests of the child

would be better served if she was left in the custody of the respondent and not with the appellant.

We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under s. 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under s. 491. That is well established as will appear from the cases hereinafter cited.

The learned Advocate for the respondent said, we should not interfere with the order of the High Court as it was a discretionary order. The learned Judges however have not given any reason which led them to exercise their discretion in the way they did. We are are not satisfied that the discretion was judicially exercised.

We are clear in our view that the judgment of the High Court was wrong and should be set aside.

It is further well established in England that in issuing a writ of *habeas corpus* a court has power in the case of an infant to direct its custody to be placed with a certain person. In *The King* v. *Greenhill* (1) Lord Denman, C. J., said:

> "When an infant is brought before the Court by *habeas corpus,* if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

See also *The Queen* v. *Clarke* (2). In Halsbury's Laws of England, Vol. IX, art. 1201 at p. 702 it is said;

> "Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of *habeas*

(1) (1836) 4 AD & E 624, 640; 111 E.R. 922, 927.

(2) (1857) 7 E.L. & B.L. 186: 119 E.R. 1217.

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corpus, and the custody awarded to the proper person."

Section 491 is expressly concerned with the directions of the nature of a *habeas corpus*. The English principles applicable to the issue of a writ of *habeas corpus*, therefore, apply here. In fact the Courts in our country have always exercised the power to direct under s. 491 in a fit case that the custody of an infant be delivered to the applicant: see *Rama Iyer* v. *Nataraja Iyer* (1), *Zara Bibi* v. *Abdul Razzak* (2), and *Subbuswami Goundan* v. *Kamakshi Ammal* (3). If the the courts did not have this power, the remedy under s. 491 would in the case of infants often become infructuous.

We, therefore, set aside the judgment and order ot the High Court and direct the respondents other than the State of Bombay to make over the custody of the child Anjum to the appellant. Let the child be produced by the respodents before the Registrar, Appellate Side, High Court of Bombay, and the Registrar will than make over custody to the appellant. The passport in respect of the child Anjum deposited in this Court by the respondents may be made over to the Advocate on record for the appellant. The injunction restraining the removal of the child Anjum outside Greater Bombay will continue till she is delivered to the appellant.

Appeal allowed.

(1) A.I.R. 1948 Mad. 294. (2) (1910) XII Bom. L.R. 891.
(3) (1930) I.L.R. 53 Mad. 72.