

**AHAMED
VS
SANJEEWA AND OTHERS**

COURT OF APPEAL
BALAPATABENDI, J AND
IMAM J.,
CA HB 03/2003
JUNE 25 AND
AUGUST 27, 2004.

Writ of habeas corpus – Constitution, Articles 14 (1) and 141 – Code of Criminal Procedure Act, No. 15 of 1979, section 115(1) – Magisterial inquiry – Corpus is a major-Married – Muslim Law – Degree of proof – Does writ lie ?

The petitioner mother prayed for a writ of habeas corpus commanding the respondents to bring up the body of the 6th respondent (daughter).

At the Magisterial inquiry it was revealed that the 6th respondent had left her home with her purported lover the 2nd respondent to whom she was legally married.

Held :

- (i) The 6th respondent corpus has presented herself before the Chief Magistrate's Court, and given details as to how she left the parental home and subsequently got married to the 2nd respondent. The 2nd respondent however had denied having married the corpus.
- (ii) As the corpus is a major, if she was misled into marriage on a false pretext, she is free to seek legal remedies in this matter.
- (iii) The petitioner in any event has not established the fact that the respondents are unlawfully detaining the 6th respondent corpus.
- (iv) A Muslim girl is freed from patria potestas on attaining 16 years of age and her father is not entitled to claim custody of her, against her will.

APPLICATION for a writ of habeas corpus.

Cases referred to :

1. *Haniffa vs Razak* - 68 NLR 288
2. *Kadippilige Seetha vs A. E. Saravanathan and others* - (1986) 2 Sri LR 228

N.M. Shahid with *M. I. M. Azver* for petitioner.

Sampath Gamage for 2nd respondent.

Jiffery Zainudeen for 4th respondent.

Kuvera de Zoysa for 1st and 5th respondents.

S. K. Wickramarachchi, State Counsel for 7th and 8th respondents.

Cur.adv. vult

December 17, 2004

IMAM, J.

The petitioner instituted an application on or about 28.07.2003 praying for a mandate in the nature of a Writ of Habeas Corpus commanding the 1st to 5th respondents to bring up the body of the 6th respondent corpus Fathima Roshana Ahamed before this Court, and to deal with her according to law. The petitioner further prays that this Court directs the Director of the Criminal Investigation Department to investigate as to the whereabouts of the 6th respondent corpus and produce the corpus before this Court as soon as possible. This application has been made under Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka. Several respondents filed objections. The petitioner who is the mother of the corpus in her application has pleaded *inter alia* that the corpus is the eldest of her four children, was born on 25.09.1984, and during the relevant period namely 20.04.2003 was 18 years and 7 months old. The petitioner's husband Brian Shabeer Ahamed is presently employed as a Logistic cum Sales Manager of Ceylon Agro Ltd. The petitioner states in her petition that on or about 20.04.2003, the petitioner on waking up at approximately 4.30 a.m. went to the room of the corpus and found her missing. The petitioner further points out that on inquiries being made from the neighborhood, apparently the corpus had left the house at night. Inquiries further revealed that a blue coloured car had been parked outside their residence during the night. The petitioner further states that on examination of the bedroom of the corpus they found a mobile phone chip bearing No. 072-819135. Upon further search her husband realised that the aforesaid

phone belongs to the 1st respondent. The petitioner stated that her husband immediately lodged a complaint at the Narahenpita Police Station with regard to the disappearance of their daughter. A certified copy of the complaint has been marked as P1. Subsequently the petitioner and her husband went to the 1st respondent's house at Kelaniya, on which occasion the 5th respondent it is alleged asked them not to make a big noise, and apparently the 5th respondent had left the house. While conversing with the 5th respondent, the petitioner points out that the 1st respondent rang him, and from the tone of the conversation, it appeared that the corpus had been taken away by the 1st respondent. Consequently the 5th respondent promised the petitioner and her husband that he would bring the 6th respondent corpus to their house during the course of the day, which he failed to do. Subsequently the petitioner's husband lodged a further statement at the Narahenpita Police Station at 23.00 hours on 20.04.2003, a certified copy of which is marked as P2.

The petitioner further states that on or about 23.04.2003, the 7th respondent instituted proceedings at the Colombo Chief Magistrate's Court in case bearing No. B 1164/3 under section 115(1) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended, and moved for a warrant to arrest the 1st respondent for the reasons set out in the 'B' report marked as P3. Although the petitioner and her husband were unaware of this development, the petitioner alleges that the 1st respondent appeared in Court with the 6th respondent corpus. The 1st respondent was represented by counsel who submitted that the 1st respondent had not kidnapped nor detained the corpus by force, and it was further submitted that the 6th respondent had left her home with her purported lover, the 2nd respondent to whom she was lawfully married. Thereafter the 6th respondent corpus gave evidence, where she stated that she was 18 years old on 20.04.2003, she had left home with the 2nd respondent and married him on 22.04.2003 at Kotahena. She further said that she came to Court at the instance of the 5th respondent. She indicated that the 2nd respondent was employed as an Artist in the "Sunday Observer". The evidence of the 6th respondent corpus is marked as P5. Subsequently the Police Officer attached to the Narahenpita Police Station informed Court that he was not proceeding with the said case and requested the learned Magistrate to direct the 1st and 6th respondents to make a statement to the Narahenpita Police. Accordingly the learned Magistrate made order terminating the proceedings

and discharged the 1st respondent. The petitioner further stated that the 1st respondent made a statement on 23.04.2003 at the Police Post of the Colombo Magistrate's Court stating that he knew the father of the 6th respondent having met him when he wanted to secure foreign employment. The 1st respondent stated that he neither helped the 6th respondent to go with her lover, nor did he detain her, nor provide the 6th respondent and her lover with shelter. He furthermore stated that the father of the 6th respondent had made a false complaint against him, a certified copy of which is marked as P7.

The petitioner further states that the 6th respondent corpus too made a statement to the aforesaid Police Post on 23.04.2003 a certified copy of which is marked as P8. In this statement she stated that she got married to her lover the 2nd respondent and that she was not prepared to divulge her address for safety reasons. She stated that she eloped with the 2nd respondent in the early hours of 20.04.2003 from her residence and subsequently married him on 22.04.2003 at Kotahena which is proved by Marriage Certificate bearing N. 3967. The said marriage she claims was witnessed by the 3rd and 4th respondents. She further states that she is living with her husband the 2nd respondent, and she expressed a fear that her father might cause harm to them. The petitioner states that on the same day namely 23.04.2003 at 10.45 a.m. she made a similar statement to the Narahenpita Police, a true copy of which is marked as P9, and a certified copy of the Marriage Certificate which is marked as P10 respectively.

The petitioner's position was that on making further inquiries with regard to the police statements, she came to know that the 2nd respondent denied that he ever got married to the 6th respondent corpus and that he never knew the corpus. Thereupon she prevailed on the 7th respondent to conduct further inquiries. Strangely enough the 2nd respondent in his statement to the Narahenpita Police on 06.05.2003 stated that he was employed at Lake House, never went out of his place of employment on 22.04.2003 and never married the 6th respondent corpus. He further stated that he wished to marry one *Chamindi Ranatunga* the next year. A certified copy of this statement is marked as P11. Moreover the witness to the marriage namely the 4th respondent, in his statement to the Narahenpita Police a certified copy of which is marked as P12 stated that the person who appeared as the bridegroom on 22.04.2003 was *not* the 2nd respondent.

The petitioner complained that she received an anonymous phone call at midnight admonishing and threatening her, and since this call she is suffering from mental trauma fearing danger to the 6th respondent corpus. A certified copy of her complaint to the Narahenpita Police is marked as P 13.

Under the aforesaid circumstances the petitioner is seeking a mandate in the nature of a Writ of Habeas Corpus as mentioned earlier.

Article 141 of the Constitution states as follows: " The Court of Appeal may grant and issue orders in the nature of Writs of Habeas Corpus to bring up before such Court.

- (a) the body of any person to be dealt with according to law ; or
- (b) the body of any person illegally or improperly detained in public or private custody....."

This Court examined the petition, the objections filed by the respondents, and the written submissions tendered by the parties.

The 6th respondent corpus is by the petitioner's own admission, an in her own evidence before the Magistrate, a major and thus entitled to the benefit of Article 14(1)(h) of the Constitution which states that "Every citizen is entitled to (h) the freedom of movement and of choosing his residence within Sri Lanka." Although this Court tends to extend some sympathy towards the petitioner, the question to be considered is whether the petitioner can obtain any relief from this application. The petitioner's own petition does not concede the fact that the 6th respondent corpus is held in the custody of the respondents and thus prayer (a) of the petition cannot be maintained. The petitioner has further failed to satisfy Court as to in which manner the 6th respondent corpus should be dealt with according to law.

The 6th respondent corpus on the contrary has presented herself before the Chief Magistrate's Court, Colombo and given details as to how she left her parental home, and subsequently got married to the 2nd respondent. The 2nd respondent subsequently denied having married the corpus, which fact is corroborated by the 4th respondent. As the corpus is a major if she was misled into a marriage on a false pretext, she is free

to seek legal remedies in this matter. The petitioner has not established the fact that the respondents are unlawfully detaining the 6th respondent corpus. The complaint made to the Police by the petitioner's husband marked "P2" illustrates that the corpus has informed her father of her unwillingness to come back home due to the fear that her father would assault her. This is manifested by the father stating himself that on 20.04.2003 the 6th respondent corpus said that "මම භොදින් ඉන්නවා. කිසිම කරදරයක් නෑ. චූඩා ගහන නිසා එන්න බයයි"

The petitioner and the 6th respondent corpus being Muslims are governed by the Muslim Law. In the case of *Hanifa Vs Razak* ⁽¹⁾ it was held that as a Muslim girl is freed from Pátria Potestas on attaining 16 years of age, and her father is not entitled to claim custody of her against her will. In the case of *Kodippilige Seetha vs A. E. Saravanathan and others* ⁽²⁾, the Court held that an allegation which if true would amount to a crime, should be proved beyond reasonable doubt. This is a cardinal principle of criminal law, and in this case the fact that the mobile phone with the chip bearing No. 072-819135 as belonging to the 1st respondent has not been proved beyond reasonable doubt by the petitioner. The petitioner has failed to prove beyond reasonable doubt that the 6th respondent corpus is in the custody of the 1st to 5th respondents. Furthermore the 6th respondent corpus in her evidence could have mentioned any allegation against the 1st to 5th respondents, which she failed to do. Under these circumstances, the only conclusion this Court can arrive at, is that the 6th respondent corpus had nothing to say against the 1st to 5th respondents. However in accordance with the judgment in *Kodippilige Sita vs Saravanathan*, (*supra*) the mere denial by the respondents of the detention of the corpus does not prevent this Court from proceeding to consider the facts in order to decide that question. ,

Having considered the facts and connected matters in this case, for the aforesaid reasons, I am of the view that the petitioner has failed to prove that she is entitled to a habeas corpus remedy as prayed for in prayer (a) of her petition. Hence I dismiss the application of the petitioner without costs.

BALAPATABENDI, J. - I agree,

Application dismissed.