(1870) 05 CAL CK 0014

Calcutta High Court

Case No: None

In Re: S.M. Ganesh
Sundari Debi alias Mani

 The Queen

APPELLANT

Vs

RESPONDENT

Date of Decision: May 11, 1870

Final Decision: Dismissed

Judgement

Phear, J.

On Friday last, at the instance of Bamasundari Debi, the mother, and Chandra Sikhar Sen and Dinanath Sen, the brothers of one Ganesh Sundari Debi, a writ of habeas corpus issued out of this Court, directed to two persons, named Hazra and Vaughan, commanding them to bring before the Court the said Ganesh Sundari Debi, who was said to be illegally detained by them. Ganesh Sundari Debi is now, I believe, in Court, and Messrs. Hazra and Vaughan have made a return to the writ substantially to the effect that they have not detained and do not detain her in their, custody; that she is of full age; that she is still with them of her own free will; that they exert no control over her; and that she comes to Court of her own accord, in pursuance of advice given by them. The case is one involving elements which cause it to be a subject of remarkable public interest. In some sense, as the learned counsel for the defendants has mentioned, it necessarily represents a contest between creed and creed, and perhaps race and race; and no thinking man, I suppose, can avoid regretting exceedingly that this event should have occurred. I can readily believe that those gentlemen who are here placed in the unenviable position of appearing to en-courage a young Hindu girl, in the determination to sever herself from her mother, her brothers, and the home of her childhood, are deeply conscious of the misfortune into which circumstances have placed them, for I can conceive no greater disaster than this as likely to befall the cause to which they are devoted, and I will say, the yet broader and higher cause which the intelligent portion of the European community has at heart. But with considerations of this sort, I have nothing to do. The writ of habeas corpus ad subjiciendum is in its aim single. It has for its object

the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen shall be illegally confined against his will. It is issued on behalf of the person said to be illegally confined. It is not issued for the purpose of lending the arm of the law to any person claiming to have authority over him. It is only where the person confined is under any personal disqualification, that the guardian or protector is looked to in the enquiry; and in such a case, the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian. Therefore, in the matter now before me, I can have no concern with what the mother and brothers of Ganesh Sundari Debi think or desire, until I have ascertained, if the fact be so, that she is not of age or discretion to judge for herself. Then what are the facts before me bearing on this point. I must look to the return, and so far as the facts there appear, I must take them as true.

2. Mr. Kennedy was correct in urging that there are authorities in support of the position that the truth of the return to the writ may be controverted by affidavits; but so far as I am able to discover, and so far as my own experience has gone, those authorities are of very early date, and are not now binding. Later decisions have all gone the other way. In Comyn''s Digest Title Habeas Corpus, 438 F, it is laid down that the Court must remand a prisoner if the return be sufficient, though false; and in Hawkins'' Pleas of the Crown, Book II, Chapter 15, section 78, it is said that "it seems to be agreed that no one can in any case controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it; yet it hath been holden that a man may confess and avoid such return by admitting the truth of the matters contained in it, and suggesting others, not repugnant, which take off the effect of them." In Ex parte Beeching 4 B. & C., 136, upon the return to the writ of habeas corpus, it appeared that the person making the return had apprehended and detained Beeching and several other persons, under the provisions of 24 Geo. III., c. 47, and 45 Geo. III., c. 121, on a charge of smuggling; and Abbott, C.J. (than whom no more learned Judge has presided over the Queen''s Bench at Westminster) allowed affidavits controverting the truth of the facts as stated for reasons which he gave as follows:--"The object of the Habeas Corpus Act, 31 Car. II, c. 2, was to provide against delays in bringing persons to trial who were committed for criminal matters. The person making this return is not a person to whom the prisoners have been committed for any such matter. The habeas corpus in this case was therefore a writ issuing by virtue of the Common Law, and I think that, under the circumstances, the 56 Geo. III, c. 100, s. 4, gives the prisoner a right to controvert the return." Lord Tenderden thus placed the right to controvert the truth of the return upon the Act of Geo. III. The distinction in the cases seems to turn on this, namely, that, unless the 56 Geo. III, c. 100, applies (and it does not apply to this country), the return to the habeas corpus cannot be questioned on the occasion of determining the validity of the detention.

3. I think that all the cases cited by Mr. Kennedy and Mr. Ghose tend to confirm that view. If there had been the power at Common Law, the very learned Judges who determined those cases would certainly not have been ignorant of it, and could hardly have felt the

hesitation which they expressed in regard to the question whether or not affidavits, repugnant to the return, could, under any circumstances, be admitted. I pointed out, however, during the argument, several modes in which the person making the return may be made responsible for it, and in more than one of these courses of procedure, affidavits are, no doubt, admissible for the purpose of proving falsehood in the return. In one stage of In re Leonard Watson 9 A. & E., 731, for instance, affidavits were, I believe, used for such a purpose. But while the truth of the statements in the return cannot, as I think, be questioned, it is certainly clear that the return may be amended. It is unnecessary to quote authorities in support of this last position. At the commencement of the case, I allowed this return to be amended, and it is enough to say now that I have more than one decision before me to show I had authority to do so. Then, looking at this return, among other things I find it thus stated:--"On the evening of Friday, the 29th day of April last, S.M. Ganesh Sundari Debi, alias Mani, in the said suit named, of her own free will and accord, and without any force, threat, persuasion, or inducement, came to the mission premises at Amherst Street aforesaid, and then being of an age and condition at which she lawfully might and could choose and determine her own place of residence, did, in the exercise of her own discretion, thenceforth remain and reside without any restraint whatsoever; that the age of the said S.M. Ganesh Sundari Debi, on the said 29th day of April last, was upwards of sixteen years, that is to say, of the age of seventeen years or thereabouts."

4. I have also had an interview with the young lady, in which she told me that she was under no restraint, and that she preferred to remain where she was, rather than go back to her mother. If then by law Ganesh Sundari is possessed of a personal discretion in this matter, I have no alternative but to dismiss Mr. Kennedy"s motion. There is no doubt that, in England, the discretion, in regard to the matter of personal freedom, does not involve directly the element of minority. A large number of well known cases have been discussed by counsel on both sides, and, I think in all of them, it is held that the discretion for this purpose is a matter to be judged of by reference to the circumstances of each case, with, however, this limitation, namely, that in England, it has of late been determined by inference from the criminal enactments that, below a certain age, the law does not allow a discretion on the matter to a female infant. The latest case on that point is Queen v. Howes 30 L.J.M.C., 47. In that case the Chief Justice says that the enactment to which he refers points out the age of sixteen as the age up to which a child ought to remain under parental control. His words are:--"By the Statute 9 Geo. IV, c. 31, s. 20, the unlawfully taking away an unmarried girl, under the age of sixteen, out of the possession, and against the will, of her father, is a misdemeanor, notwithstanding the consent of the child." We may safely act by the guidance of the light thus thrown on the subject, and say that, until the age of sixteen years, a young woman cannot choose to act for herself. The decision given by the Chief Justice apparently was not limited to the case of a female, but his argument was so. I entirely adopt the resoling which the Court followed in that case. In this country we have the Penal Code, section 361 of which makes it an offence to take or entice a female child under sixteen years of age out of the

keeping of her lawful guardian. The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor. I understand by the words of the section that the Legislature here contemplated a case where the abductor had obtained the consent of the girl. It follows then that, in this country, as in England, a girl under sixteen has not a discretion such as enables her by giving her consent to protect any one from the criminal consequences of inducing her to leave the keeping of a lawful guardian; in other words, she is not allowed by law to choose for herself. But this young lady I must take to be above sixteen years of age; the return to the habeas corpus says she is seventeen. She is therefore outside that class of minors whom the Penal Code impliedly deprives of all choice in this matter, and I have not been shown any authority in support of the contention that a girl of upwards of sixteen years of age has no discretion with regard to her personal freedom. It is true that Mr. Ghose referred me to some venerable and venerated precepts of Hindu sages which have the effect, as he himself said, of placing a woman in a legal dependence on the males of her family for her whole life. If, on the occasion of this return (where I may remark I am not trying and adjudicating upon a question of civil rights as between party and party), I am bound to give weight to this class of authorities, this consequence must follow, namely, that no woman of any age could be liberated from restraint placed on her by the head of her family, notwithstanding it was completely against her will, and such a result would, in truth, amount to a suspension of the Habeas Corpus Act for all female members of the Hindu community. It is sufficient to state the necessary consequence of such an argument to show that, I ought not now to allow myself to be influenced by it. While this case has lasted (now some days,) I have thought over carefully and anxiously this last issue, i.e., what amount or kind of personal disqualification or infirmity ought to lead this Court to refuse discretion to a female who is upwards of sixteen years of age. From the beginning I felt no doubt on any other matter brought before me, but on this I confess my mind has at times wavered, and my hesitation was not a little increased by my interview with the girl. I have no reason, from my own observation for supposing that the return in the matter of age is incorrect, and indeed, if I had such reason, it would not be in such a shape that I could give it effect. But I am bound to say that I could not avoid drawing the conclusion that the young lady is, as far as my judgment goes, exceedingly ignorant on matters of general information, and very ill-informed on that particular subject which, she says, has engaged her attention, and has been the particular purpose of her masters to instruct her in for the last two years. It appeared to me, from that undoubtedly very short interview, that she does not possess in regard to it any very tangible idea which can be termed accurate. Her ignorance of the structure of the one Sacred book seemed to me something in itself marvelous, considering that (as I understood her) it has of late been almost the sole object of her studies. I cannot blind myself to the dangers which must be incurred when a person so young, ignorant, and uninstructed as this person appears to be, takes the perilous step of leaving the society of those who have been about her all her life, and goes to strangers whose very names she does not know. Still I could see nothing in her to indicate that she has not sufficient capacity of mind to choose in the matter of her own freedom: for nothing, I apprehend, can be clearer than that personal discretion of

that sort does not, in the eye of the law, depend on the mental culture or state of instruction of the individual. If it were so, there would be an end to the liberty of the poor and ignorant. On the whole, I think that Ganesh Sundari Debi is a young woman who has attained an age, when the law will allow her to speak for herself. I can perceive no such special disqualification as would justify me in keeping from her that liberty to which all alike, without regard to sex, are entitled. I only trust she will exercise that power of choice as may be best for her welfare. I must dismiss Mr. Kennedy''s application. Ganesh Sundari must be brought before me into Court, when I will tell her that she may go where she likes [(2)].

[(1)] The Court at the hearing allowed these words to be struck out.

[(2)] The girl was then brought into Court; and after being told by the Judge that she might go where she pleased, and haying had an interview with her mother, she chose to remain with the defendants.