(2000) 10 P&H CK 0028

High Court Of Punjab And Haryana At Chandigarh

Case No: First Appeal From Order No. 877 of 1998

Buta Ram		APPELLANT
	Vs	
Veeru Ram alias Berru Ram		RESPONDENT

Date of Decision: Oct. 3, 2000

Citation: AIR 2001 P&H 127 : (2001) 2 ILR (P&H) 209

Hon'ble Judges: S. S. Sudhalkar, J

Bench: Single Bench

Advocate: G.S. Jaswal, for the Appellant; S.S. Bains, for the Respondent

Final Decision: Dismissed

Judgement

S. S. Sudhalkar, J.
Happy-Mangat Ram (then aged 12 years) and Jhallu alias Sonu-Mohan Lai (then aged 7 years) are the sons of Khushi Ram and Asha Rani. Asha Rani had expired before the death of Khushi Ram. Khushi Ram died on 3-2-1992. He was working as Sweeper in the Army. After his death, the custody of two children was handed over to the appellant-Buta Ram. Veeru Ram alias Beeru Ram filed an application for the custody of minors and the property of the minors. The same was allowed and hence Buta Ram has come in appeal before this Court.

2. Admittedly, Veeru Ram is the real brother of the deceased Khushi Ram. The petitioner and Buta Ram are sons of the same mother but their fathers are different. Before hearing the arguments I had called Against order of A.S. Kathuria, PCS Civil Judge, (Sr. Division), Gurdaspur, D/- 18-81998 both the sons of Khushi Ram in the Chamber and questioned them. Both have stated that they wanted to stay with Buta Ram. It also appears from the judgment of the Court below that the same was the position and they had stated that they wanted to live under the guardianship of Buta Ram. However, the Court observed that the wishes of the minor children do not appear to be genuine and they are immature to do the thing independently about their welfare and it appeared that they have been tutored to

give statement in the Court.

3. I have heard the Learned Counsel for the parties.

4. The parties have led evidence in the Court below. Learned Counsel for the Respondent has submitted that the appellant is not keeping the minors properly and they are not being looked after properly. They are not being educated and, therefore, the custody should not remain with him and that it is also submitted by him that the respondent is the real brother of the deceased and has a better right to the custody of the children.

5. Respondent-Veeru Ram has examined Dalip Chand as AW-1. According to him, Khushi Ram was cremated at Pathankot. His wife and his relatives were also present there. He was serving in the Army as Sweeper; he did not know Buta Ram. He has further stated that after the death of Khushi Ram and his wife, there was none to look after their children and Veeru Ram is the real brother of Khushi Ram.

6. Veeru Ram has been examined as AW-6. He has stated that Buta Ram has taken the children along with him from Chakki Parah and they are residing with Buta Ram. Buta Ram is not related to the children in any way and had taken children with him only for the sake of money and if the custody of the children is given to him, he would arrange better education for them. He has examined other witnesses also. They are AW-2 Ram Lal Postor who has brought the death register of the Church. AW-3 Gulzar Masih, an employee in the office of Station Head Quarters, Mamoon Court (Pathankot) and has stated that the deceased was employed as Sweeper in the Army and Rs. 16517/- has been passed towards his GIS claim, which has been put in fixed deposit in favour of minor sons Mohan Lal and Manga Ram in equal shares. I am told by the counsel that Mohan Lal is the name of Happy and Manga Ram is the name of Jhallu and Buta Ram has been mentioned as successor. Rs. 517/- were given to Buta Ram. In the cross-examination, it is submitted that staff members and the relatives had handed over both the children to Buta Ram.

7. A.W.-4 Sunny is a labourer. He has stated that he does not know Buta Ram and last rites of Khushi Ram were performed on 4-2-1992 and on that date, Buta Ram had taken children along with him and he does not know what happened thereafter. He has further stated that in case Veeru Ram is given the custody of children, he would afford better food and clothes as well as education to them. This is his opinion.

8. AW-5 is Kamal wife of Bania Ram. She has also stated the same thing and repeated that if Veeru Ram is given the custody of children, he would treat them like his own children and bring them up properly and that Veeru Ram is an ex-serviceman.

9. Buta Ram, RW-2 has stated that he got the custody of children through the Army and that Kanshi Ram had asked the children to reside with him. He has further deposed that Khushi Ram had died of T.B. and he was getting him treated. He has also stated that he

looks after the children and bear their education expenses and they are very happy with him. He has further stated that SDM had given the custody of the children to him. He has further stated that money which the minor had got after the death of Khushi Ram has been put in F.D.Rs. and he will not withdraw that money rather the children themselves would withdraw the same. He has further stated that the original FDRs are with the Amoora Cantt. Army.

10. Buta Ram examined a witness namely Ram Lal as RW-1, who in his cross-examination stated that he is on visiting terms with Buta Ram and he goes to his house in connection with work only. He has further stated that children of Buta Ram throw away dust and waste of his house and removes the dung of his animals. They don''t take out the animals for grazing, however, they bring fodder from the field for them. He has further stated that they come for work at 4/5 AM in the morning and go back after finishing the work and they again come in the evening at 5.00 PM and go back after removing the waste and cow dung from his Haveli (Stable).

11. It is unfortunate that the evidence regarding the education of the children is not produced. His counsel argued that the work the children are doing is normal work but that does not mean that the children are not looked after properly or that they are not given good education.

12. Veeru Ram in his deposition has stated that he has five daughters and 3 sons. Regarding the minors he has stated that Buta Ram states that he is sending the children to school. In the examination-in-chief, Veeru Ram has not stated as to what is his income and how he will be able to feed the children. Learned Counsel for the re-spondent-Veeru Ram argued that when Veeru Ram is able to maintain his eight children, he can maintain two other children of Khusi Ram also. This argument is without any basis. Unless the income of a person is known, the number of children he is having will not show that he will be able to maintain more children. AW-5 Kamla w/o Bania Ram has stated in her cross-examination that Veeru Ram is unemployed. No evidence has been shown to me from which Veeru Ram''s income can be assessed, though same is the position regarding Buta Ram.

13. This is the position in this case. None of the parties have led evidence to show that they will be able to maintain the children give them proper food, clothes and educate them. Though Buta Ram has stated that he is educating the children, he has not produced any documentary evidence which he could have done. However, it cannot be said that with Veeru Ram the children will be able to get better facilities. The trial Court has gone on the relationship of the parties with the deceased and held that Veeru Ram is the brother of the deceased while Buta Ram is a stranger to the family. This has weighed much with the Court below in passing the order. The trial Court has also observed that it is not shown that Veeru Ram will not able to maintain the children. So far as the capacity of maintaining the children is concerned, each party should have proved its own case, which is not done. With this position, this Court has to come to the conclusion as to who

should be the guardian.

14. I had question the children by calling them in my Chamber. They were called one after the another and were questioned in the absence of the lawyers and parties. Mangat Ram stated that his name is Happy and Buta Ram is his Tauji i.e. brother of his father and he wants to stay with him. He further stated that he is studying in 8th class and he is not subjected to any labour work. The other child told his name as Mohan and he stated that he does not know who was Jallu or Sonu. He has stated that Buta Ram is his tau and he wants to stay with him and not with Veeru Ram. He has stated that he is studying in 5th standard.

15. While questioning the children care was taken that they are not stating any thing under the influence of any body and that is why they were called for by me without the lawyers and parties. Both were called one after the other so that they should not have fear that other child will state against him. The trial Court has held that the children could be tutored, however, when above precautions were taken and the wishes of the children were tried to be known, the possibility of outside influence was totally eliminated and therefore, there was no reason to hold that the wishes stated by the children were not true.

16. With the above set of evidence, I find that the wishes of the children should prevail because the custody of the children is not to be treated as a right of inheritance. Children cannot be treated as chattel. Therefore, I do not accept the reasons given by the trial Court in passing the Judgment to be correct.

17. It has been stated by the counsel for the appellant and admitted by the respondent that one of the children i.e. Happy has become major. The trial Court has observed that at the time of death of Khushi Ram Happy was 12 years of age. Khushi Ram died in the year 1992 and therefore, Happy is major today. Happy has also stated that his date of birth is 25-4-1981. In view of this position, the order for handing over the custody of Happy is being set-aside. On the reasons mentioned above, the Judgment regarding the other minor also deserves to be set-aside.

18. The trial Court has ordered guardianship of movable and immovable property of the minors to be given to respondent Veeru Ram. It is not shown as to which immovable property they are having and at the time of arguments, both the counsel stated that the amount which was given by the Army authorities and put in F. D. Rs is the only property of the children. The amount in the F.D. Rs. is ultimately to be given to the children. FDRs are required to be retained in the Court and further order regarding division of the amount between the two children and payment thereof, has to be passed by the Court separately. For this purpose, therefor, the matter will have to be remitted to the Court below.

19. As a result this appeal is allowed. The judgment of the trial Court is set aside. Buta Ram appellant is directed to deposit the F.D.Rs. with the trial Court and the trial Court

shall, after hearing the parties, including Happy who has become major, pass necessary orders regarding payment or further investing the amount as it deems fit. Except the above directions, the petition of the respondent stands dismissed.