(1997) 07 P&H CK 0032

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Writ Petition No. 325 of 1997

Dr. Sanjeev Malhotra		APPELLANT
	Vs	
Union Territory		RESPONDENT

Date of Decision: July 24, 1997

Acts Referred:

- Constitution of India, 1950 - Article 226
- Guardians and Wards Act, 1890 - Section 13(2)
- Hindu Minority and Guardianship Act, 1956 - Section 6

Citation: (1998) 1 CivCC 268 : (1998) 118 PLR 739 : (1997) 4 RCR(Civil) 558

Hon'ble Judges: S.C. Malte, J

Bench: Single Bench

Advocate: R.L. Batta and Arvind Moudgil, for the Appellant; G.C. Dhuriwala, for the Respondent

Final Decision: Dismissed

Judgement

S.C. Malte, J.

Father of child Sidharth (aged about 5 years) has filed this writ petition for issuance of writ of habeas corpus for producing the said child Sidharth who is said to be in custody of respondent 3 Dr. Aradhana, who is mother of the said child. This is an unfortunate litigation between the parents of the child, who could not reconcile themselves in their matrimonial relations. The petitioner married respondent No. 3 on 21.4.1987. From this wedlock child Sidharth was born on 5.9.1990. The contents of the writ petition and the reply filed by respondent 3 indicate that the relations between the husband and wife started straining, and there are allegations and counter-allegations. The sequence of events also indicate that some efforts were made to reconcile the couple, but these ultimately yielded no result. In the course of this judgment I will refer to some of such events.

2. In so far as it pertains to the writ of habeas corpus, the contention by the petitioner is that child Sidharth was taken away by respondent 3 on 22.3.1996, and thus he is deprived of his custody. It is contended by him that Sidharth was staying with him upto March, 1996 and he was studying in D.A.V. Public School, Mohali. Respondent 3 used to visit at Mohali on week-ends or on off days. At this juncture, it may be mentioned that the petitioner and his wife respondent 3 are Medical practitioners. Respondent 3 is employed as Medical Officer at Primary Health Centre, and at the relevant time she was posted at Kalanour, District Yamunanagar, Haryana. However, her place of residence as shown in the petition is, House No. 5983, Modern Housing Complex, Manimajra, U.T. Chandigarh. It may be mentioned that Mohali is also adjacent to Chandigarh as suburban. It appears from the submissions from both the sides that the petitioner and respondent 3 had separate residence for one reason or the other. One of the reasons was that respondent 3 was employed as Medical Officer and she used to be posted at various places. May it be, as per the petition, respondent 3 used to come to the petitioner till March, 1996 and used to meet her child Sidharth. The petitioner submits that on 22.3.1996 respondent 3 took away the child to Patiala under the pretext of meeting her parents, and thereafter did not return the child. On 8.4.1996 respondent 3 is said to have come to the house of the petitioner along with her maternal uncle and aunt and took away all her belongings with her in the presence of petitiontr''s neighbours, family members and relatives. Thereafter her parents shifted to Manimajra, Chandigarh, and respondent 3 got the child Sidharth admitted to Class I in D.A.V. School, Sector 8, Panchkula in April, 1996 without the consent of and information to the petitioner. The petitioner further claims that respondent 3 and her parents have left instructions with the school authorities not to allow the petitioner and other family members of his family to see the child. The petitioner, therefore, has rushed to the Court for the custody of the child.

3. The real contestant is respondent 3. She filed a reply and refuted the allegations made in the petition. She has also put forth a grievance as to how on various occasions she was being harassed and even assaulted. In so far as the allegations made by the petitioner and the respondent against each other are concerned, presently I need not go into details because that aspect is not required to be adjudicated in this writ petition. The net result of the contentions raised in this writ petition clearly indicate that the relations between the husband and the wife have been strained considerably and both of them are now struggling over the custody of the child.

4. The petitioner filed replication to refute the allegations made in the reply. As mentioned above presently I would not be adjudicating the allegations between the two, and the only question before me is as to the custody of the child.

5. A preliminary objection raised by respondent 3 was that for the custody of the child a writ of habeas corpus does not lie. Contemplating that such a stand would be

taken, the counsel for the petitioner brought my attention to the case of Gohar Begam Vs. Suggi alias Nazma Begam and Others, . In that case, their Lordships of the Supreme Court entertained the writ petition for considering the relief for custody of an infant female illegitimate child. The facts of that case indicate that the petitioner Gohar Begum was in keeping of one Trivedi. From Trivedi child Anjum was bom. She was infant illegitimate child when dispute regarding her custody arose. Trivedi had a visa for visiting to foreign country. On one occasion he had gone to Pakistan with child Anjum. In these circumstances, petitioner Gohar Begum, mother of the said child, demanded the child Anjum; but the said Trivedi declined. There was apprehension that Trivedi would take the child to Pakistan. Under these circumstances, she moved the High Court for custody of the child. The High Court declined to interfere. The mother came up before the Supreme Court. Their Lordships were of the view that since the respondent did not have any legal right to custody of the daughter, and in view of the paramount consideration of the welfare of the child, there is no bar to the Habeas Corpus petition though there is also a remedy available under the Guardian and Wards Act. The counsel for the petitioner submitted the case of Kamla Devi v. The State of Himachal Pradesh, 1988 Marriage Law Journal 17. In that case the facts indicate that the husband under the influence of liquor used to assault and maltreat the wife. The couple had twin sons from the wedlock. On one occasion, the husband of the petitioner, while under the influence of liquor, asked the custody of the children since he wanted to go away with them. The petitioner refused to oblige. The respondent then tried to snatch the children forcibly. The petitioner raised alarm and the respondent went away. Again on the next day he tried to take away the children. Thereupon the petitioner locked the house to prevent the entry of the respondent. The respondent then reported the matter to the police who directed to unlock the house. The petitioner was summoned in the police Chowki on the next day. Thereafter on the day following the children were ultimately taken away by the respondent. In the set of these facts, Their Lordships of the Himachal Pradesh High Court expressed the view that in an appropriate case a writ of habeas corpus for the custody of the children can be entertained.

6. The counsel for respondent 3 brought my attention to the case of Kulwant Kaur v. The Senior Superintendent of Police 1997 P.L.T. 252, the case of Pricella Prim v. Bashir Masih, 1995 (1) RCR 672 and the case of Kiran Ram v. Krishan Kumar 1995 (1) RCR 430. These are the cases decided by the single Benches of this Court, and in all these cases, it was observed that in respect of relief for custody of the child sought by either of the parents of the child, the appropriate remedy would be a petition under the Guardians and Wards Act, 1890, and writ jurisdiction under Article 226 of the Constitution need not be invoked. On considering all these reported cases, the ratio is that writ jurisdiction can be invoked when there is compelling circumstances and it is necessary in view of the well settled principle of paramount consideration of the welfare of the child.

7. The counsel for the petitioner brought my attention to Section 6 of the Hindu Minority and Guardianship Act, 1956, and submitted that the natural guardian of a boy more than five years would be father and after him mother. That section further provides that custody of a minor who has not completed the age of five years, shall be ordinarily with the mother. These provisions of the Hindu Minority and Guardianship Act are to be read with Section 13 of that Act, and are supplemental to the provisions of the Guardians and Wards Act, 1890. Section 2 of the Hindu Minority and Guardianship Act, 1956, in clear words state that the provisions of that Act shall be in addition to, and not, save as expressly provided, in derogation of the Guardians and Wards Act, 1890. Section 13 of the Hindu Minority and Guardianship Act provides that while appointing guardian of a minor, the welfare of the minor shall be of paramount consideration. Clause (2) of it further makes it very clear that "no person shall be entitled to guardianship by virtue of the provision of this Act.... if the Court is of the opinion that his or her guardianship will not be for the welfare of the minor" Section 17 of the Guardians and Wards Act, 1890, provides that in appointing or declaring the guardian of a minor, the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be " for the welfare of the minor. Clause (2) provides that while considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor. Clause (3) further provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. The considerations which weigh while appointing guardian, would be equally relevant while sorting out the rival claim between husband and wife regarding custody of a minor. In my opinion, therefore, while considering the custody of the child in this case, the matter need not be looked into from the angle of enforcing the right of custody of a child as if it is a right to have the custody of a child as a chattle. Provisions of Section 6 of the Hindu Minority and Guardianship Act appear to be more in the nature of an obligation cast on the parents to act as guardian and to have the custody of a child. That is more in the nature of social obligation and not necessarily expression of a right over the child as if child is a property. Section 13 of that Act also renders support to such an outlook of interpretation. In all such cases the paramount consideration would always be the welfare of the child. Any. conflict with that should be resolved in favour of the consideration of welfare of the child.

8. In this case admittedly, the petitioner and the respondent 8, that is the parents of the child, are well-educated and are Medical practitioners. Admittedly, both are financially well off. The child is presently studying in a school. Unfortunately for the child the relations of the parents inter se are strained considerably and they are at present at the loggerheads, and are making allegations and counter-allegations. The child is about to complete seven years of his age on 5.9.1997. In order to ascertain the wishes of the child, I called the child near me and put him certain questions. I have taken a note of what transpired during that viva-voce examination.

The note is as follows:-

"During the course of arguments of this matter, I found that the child is in the court hall. After the arguments of both the sides were over, I called the child near me on the dias. The child was made comfortable by putting preliminary questions, as to what food he has taken since morning, whether he goes to school, and how many friends he has. He gave answers boldly to all these questions. Thereupon I put him a question whether he would like to stay with me. He replied in the affirmative. Thereafter I put him a question as to with whom he would like to stay. His reply was "with mother". I then asked him whether he would like to stay with his father. The child nodded in the negative."

9. It, therefore, clearly appears that the child wants to stay with his mother. He does not want to stay with his father (petitioner). It was submitted by the counsel for the petitioner that wishes of this child of tender age need not be taken into consideration. He relied on Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, . On facts, that case is distinguishable. In that, the girl aged eleven years had expressed different kinds of wishes at different times under different conditions. The Court found that welfare of the child would be achieved by putting her in a boarding school. In this case I find that the child is capable enough to express his desire. His choice, therefore, cannot be discarded unless there is material to show that the welfare of the child could be achieved better by putting him in custody contrary to his wishes. In this case no such material is before me. The only ground submitted by the petitioner was that he wanted to put the child in a school where, according to him, the child would begetting the best education. But presently the child is studying in a Public School. He is just in first standard. I do not think that education of the child in any way would suffer.

10. In the context, Annexure P-18 dated 8.4.1996 deserves attention. It indicates that on 8.4.1996, respondent 3 left petitioner after taking certain articles, and further declared that the child is with her. P-18 produced and relied on by petitioner. It clearly indicates till that day petitioner had no grievance regarding custody of child with respondent 3. Thereafter on 103.1997 he filed the present petition.

11. The petitioner finds himself unable to see the child . That is undoubtedly a sentimental aspect. If the petitioner feels that he should have an opportunity to meet the child or have the child to iris house, he can have separate remedy by filing a petition either under the Guardians and Wards Act or any other provision, as may be advised to him. In the set of circumstances, I find no reason to exercise the powers under. Article 226 of the Constitution. Petition dismissed.