

(1993) 03 AHC CK 0021

Allahabad High Court

Case No: Habeas Corpus Petition No. 4466 of 1992

Tribhuwan Tiwari

APPELLANT

Vs

Shiv Kumar Tiwari and Another

RESPONDENT

Date of Decision: March 1, 1993**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 125

Citation: (1993) AWC 1297 : (1993) CriLJ 2407 : (1993) 2 DMC 4**Hon'ble Judges:** R.B. Mehrotra, J**Bench:** Single Bench**Advocate:** Narsingh Dixit, for the Appellant; Standing Counsel, for the Respondent**Final Decision:** Allowed

Judgement

R.B. Mehrotra, J.

The present Habeas Corpus petition has been filed on behalf of minor Tribhuwan Tiwari aged about 8 years through his mother Smt. Vidyawati W/o Ram Bali Tiwari, praying for a direction to the opposite parties, Sri Shiv Kumar Tiwari and Sri Ram Bali Tiwari to handover the boy from their custody to the custody of the mother, Smt. Vidyawati.

2. Smt. Vidyawati was legally wedded to the opposite party No. 2 Sri Ram Bali Tiwari according to the Hindu rites and customs and were living together as husband and wife at the residence of opposite party No. 2. The case of Smt. Vidyawati is that she conceived and produced a son about 8 years back out of her marital relations with Sri Ram Bali Tiwari, opposite party No. 2. Opposite party No. 2 Sri Ram Bali Tiwari had illicit connection with a girl of a nearby village, as such, he was illtreating the petitioner. About three years back, when the father of Smt. Vidyawati went to enquire about ill-treatment of Smt. Vidyawati, she was beaten and forcibly evicted from the house, consequently she had to go back with her father alongwith her son,

namely, Tribhuwan Tiwari, and is living with her father! at her father's house. On 3-1-92 she filed an application in the Court of Munsif, Deoria u/s 125 of Cr. P.C. in which both Smt. Vidyawati and Tribhuwan Tiwari were made applicants and present opposite parties, namely Sri Ram Bali Tiwari, the husband of Smt. Vidyawati and Shri Shiv Kumar Tiwari, father of Sri Ram Bali Tiwari were arrayed as respondents. She prayed in the aforesaid application that the respondents be directed to pay Rs. 500/- per month as maintenance allowance for the maintenance of the applicants. The aforesaid application was contested by her husband Shri Ram Bali Tiwari and father of Sri Ram Bali Tiwari, namely, Sri Shiv Kumar Tiwari. In the written statement in reply to the aforesaid application the respondents pleaded that it is wrong to allege that Tribhuwan Tiwari has born out of the sexual relationship between Sri Ram Bali Tiwari and Smt. Vidyawati but the fact is that Tribhuwan Tiwari has born out of illegitimate relationship of Smt. Vidyawati, his wife with his elder brother Sri Ram Sakal and Smt. Vidyawati and Sri Ram Sakal continued to have illegitimate sexual relationship and Sri Ram Sakal is maintaining Smt. Vidyawati.

3. She also disclosed in her Habeas Corpus petition that Sri Ram Bali Tiwari has also filed a divorce suit in the Court of Civil Judge, Deoria, wherein Smt. Vidyawati and Sri Ram Sakal have been arrayed as respondents. In the aforesaid divorce suit also Sri Ram Bali Tiwari has repeated the same story which he has alleged in defence of Section 125 Cr. P.C. application moved by Smt. Vidyawati. Again it has been alleged in the divorce suit that Tribhuwan Tiwari is not his son and has been born out of the illegitimate sexual relationship between Sri Ram Sakal and Smt. Vidyawati. Smt. Vidyawati in her Habeas Corpus petition has alleged that minor Tribhuwan Tiwari is being wrongfully and illegally detained by his grand father, Sri Shiv Kumar Tiwari, who has no right to keep the custody of Tribhuwan Tiwari. As such, she is entitled for release of the child in her favour.

4. In the aforesaid Habeas Corpus petition, a notice was issued to Sri Shiv Kumar Tiwari and Sri Ram Bali Tiwari and they were directed to produce Tribhuwan Tiwari in the Court.

5. In response to the aforesaid notice, Sri Shiv Kumar Tiwari filed counter affidavit on his behalf and on behalf of Sri Ram Bali Tiwari and also produced the minor child Tribhuwan Tiwari in the Court, as per direction given by the Court. In the counter affidavit filed by Sri Shiv Kumar Tiwari the same story has been repeated which was taken as defence in an application u/s 125 of Cr. P.C. filed by Smt. Vidyawati and Tribhuwan Tiwari and it has been stated that Tribhuwan Tiwari, has born out of illegitimate sexual relationship between Sri Ram Sakal, the elder brother of Sri Ram Bali Tiwari and Smt. Vidyawati, and is being maintained had brought up by Shri Shiv Kumar Tiwari as his grand son. It has also been stated in the counter affidavit that in the proceedings u/s 125 of Cr. P.C. Smt. Vidyawati has already filed an application with an allegation that her son Tribhuwan Tiwari minor has been enticed away by Sri Shiv Kumar Tiwari, her father-in-law on 9-6-92 in the absence of her father from her

house and he should be directed to produce the child and child should be given in her custody. The counter affidavit further discloses that on the said application, the Court directed the opposite parties to produce the child in the Court, but despite the said order, the opposite parties have not produced the child in the Court, as the child was not ready to live with his mother. On the basis of the aforesaid facts, it has been contended that the said material fact has been willfully concealed by Smt. Vidyawati in her Habeas Corpus petition and the present Habeas Corpus petition deserves to be dismissed on the ground of concealment of this material fact.

6. The minor child Tribhuwan Tiwari aged about 8 years was brought to my chambers and I talked to the child on 20-1-93. The child was not ready to talk to his mother. After hearing the Counsel for the parties I recorded in my order on the said date that I have a feeling that the child is under duress and he should be kept under independent custody for sometime atleast and accordingly, I directed that the child namely Tribhuwan Tiwari should be handed over to the custody of Sushri Sadhana Upadhyaya, Advocate of this Court, with a direction that she will produce the child tomorrow in the Court. The matter was again taken up on the next day i.e. on 21-1-93 and I noticed and talked to the child. He had fully reconciled and was not insisting on going with his grand father, Sri Shiv Kumar Tiwari.

7. I have heard the learned Counsel for the petitioner, Sri Narsingh Dixit, Sri Swaraj Prakash, learned Counsel for the opposite parties and M/s. Sadhana Upadhyaya, who has intervened in the matter on humanitarian ground with the permission of the Court.

8. Sri Swaraj Prakash, the learned Counsel for the opposite parties has taken three preliminary objections regarding maintainability of the Habeas Corpus petition. The first objection raised by Sri Swaraj Prakash is that the Habeas Corpus petition is not maintainable, as the petitioner has not disclosed in her petition that she has already filed an application for the production of the child in proceedings u/s 125 of Cr. P.C., wherein already an order has been passed by the Court for production of the child. For this material concealment, the Habeas Corpus petition deserves to be dismissed. The second objection is that the question of guardianship of the minor can be effectively decided only in an application under Hindu Minority and Guardianship Act and the present Habeas Corpus petition should be dismissed on the ground that the petitioner has an alternative remedy of moving application under Hindu Minority and Guardianship Act. The third objection is that u/s 6(a) of Hindu Minority and Guardianship Act, 1956, the mother is entitled for the custody of minor only upto the age of five years, thereafter she is not entitled to the custody of the minor child. As such, Smt. Vidyawati has no right to file the present Habeas Corpus petition for the custody of her son Tribhuwan Tiwari, who is admittedly aged about 8 years. Lastly Sri Swaraj Prakash submitted that in Habeas Corpus petition, the paramount consideration for the Court for handing over the custody of the child should be the welfare of the child and in the present case since the child is not willing to go with

his mother and since Smt. Vidyawati has no source of earning for maintaining and bringing up the child, the release of child in her custody will not be for the welfare of the child Tribhuwan Tiwari. As such, the present Habeas Corpus petition deserves to be dismissed.

9. In support of his submissions, Sri Swaraj Prakash has cited [Marggarate Maria Pulparampil Nee Feldman Vs. Dr. Chacko Pulparampil and Others](#), Full Bench, wherein it has been held that in using the writ of Habeas Corpus for the custody of infants the jurisdiction exercised by the Court in deciding whether the custody should be entrusted with one or the other of the contesting parties depends not on the legal right of one of those parties to the custody of the child but as to whether in the best interests and welfare of the child the custody should be entrusted with one or the other.

10. The other decision relied upon by Sri Swaraj Prakash is [Smt. Renu Vaid Vs. Ravi Vaid](#), ; where the same principles have been reiterated and it has been held that-

"The general principle in matters relating to the custody of a minor is well settled that the paramount consideration is the welfare of the minor and not the legal right of this or that party."

11. Sushri Sadhana Upadhya intervening in the matter, submitted that in the present case the father is not claiming the child against the mother. On the other hand, the father's case is that Tribhuwan Tiwari is not his son. If this be so, then Sri Shiv Kumar Tiwari, father of Sri Ram Bali Tiwari cannot claim himself to be grand father of the child. On these allegations, neither Ram Bali Tiwari, husband of Smt. Vidyawati, nor Sri Shiv Kumar Tiwari father of Sri Ram Bali Tiwari have any right to keep the minor child in their custody. Moreover, the welfare of the child cannot be said to be safe in the hands of persons who are even denying the parentage to the child. The child is bound to be exploited, as Sri Ram Bali Tiwari is not ready even to own Tribhuwan Tiwari as his son. In these circumstances, the mother is only person who can look after the welfare of the child and who can bring him up with affection and care.

12. I have given a careful consideration of the submissions of the Counsel of the parties and Sushri Sadhana Upadhya. The preliminary objections raised by Sri Swaraj Prakash are not sustainable. In the Habeas Corpus petition it has been clearly stated that Smt. Vidyawati has filed an application u/s 125 of Cr. P.C. against her husband Sri Ram Bali Tiwari and her father-in-law Sri Shiv Kumar Tiwari. There is no jurisdiction with the Magistrate for directing the handing over of custody of a minor child in proceedings u/s 125 of Cr. P.C., as such, it was not necessary for her to disclose in the present Habeas Corpus petition about the moving of the application for the custody of the child and passing of the order by Munsif, Deoria for production of the child. Such an order was not enforceable. For this reason the respondents admittedly did not produce the child before the Magistrate and it was

not such a fact which would have any effect on the decision of the present Habeas Corpus petition. For this reason the present Habeas Corpus petition cannot be rejected on the ground that the petitioner has made any willful concealment of fact which had any bearing on the decision of the Habeas Corpus petition. The said preliminary objection raised by the Counsel for the respondents is rejected.

13. So far as the objection of the respondents regarding availability of alternative remedy is concerned, it is well settled that Habeas Corpus petition should not be rejected on the ground of availability of alternative remedy i.e. moving application under Guardianship Act (see Smt. Sunita Malik v. Dharam Veer Singh Malik 1992 A.D.R 400 , The relevant portion of the said judgment is as under :-

"It is well settled that a writ of Habeas Corpus would be maintainable to enforce the legal right to the custody of minor. In the law of Extraordinary Legal Remedies by Ferris & Ferris it has been observed as follows in para 4 of the chapter dealing with Habeas Corpus :

"The writ has for its object that the speedy reliefs, by judicial decree, of persons who are illegally restrained of their liberty. It also lies where a party is held by one person when another is entitled to custody, in which case the Court is empowered to deliver him from the unlawful imprisonment by committing him to the custody of the person, who is by law entitled thereto, as in the cases of infants and insane persons."

In Halsbury's laws of England Vol. II, para 1469, the law has been more succinctly stated as under :-

"A parent, guardian or other person who is legally entitled to the custody of a minor can regain that custody, when wrongfully deprived of it by, means of writ of Habeas Corpus. For the purpose of the issue of the writ the unlawful detention of a minor from the person who is legally entitled to his custody is regarded as equivalent to unlawful imprisonment of the minor. In applying for the writ it is, therefore, unnecessary to allege that any restrain or force is being used towards the minor by the person whose custody and control he is for "he time being." Therefore, even if the minor children are not being unlawfully detained, the present Habeas Corpus petition filed by their mother is maintainable."

14. It is well settled that in Habeas Corpus petition the corpus of a minor can be handed over in favour of a person who will safeguard the welfare and interest of minor. The Court is bound to give such direction for handing over the corpus of the minor child in Habeas Corpus petition, which the Court thinks proper in the best interest of the child. The question of actual entitlement of the person to hold the guardianship of the minor child is not to be determined in the Habeas Corpus petition. Besides that u/s 6(a) of Hindu Minority and Guardianship Act, the mother is the guardian of a minor boy after father. In the present case father is not coming forward to claim the guardianship, naturally mother becomes entitled to claim the

guardianship of the minor boy Tribhuwan Tiwari. As such the third objection raised by Sri Swaraj Prakash has also no substance.

15. However, in the present case the allegations made by the respondents that Tribhuwan Tiwari is born out of the illegitimate sexual relationship between Smt. Vidyawati, mother of the child and Sri Ram Sakal the elder brother of Sri Ram Bali Tiwari will make the child illegitimate and as such, no person other than mother of the child will be entitled for his custody and guardianship. I am not expressing any opinion about the correctness of the allegations made by the respondents that Tribhuwan Tiwari has not been born to Smt. Vidyawati from her marital relationship with Sri Ram Bali Tiwari. These allegations have been made in divorce petition and in defence of application u/s 125 Cr.P.C. in which the Court will give their findings on the basis of evidence produced by the parties, but it is very clear that once the respondents make these allegations, then they have no right to keep the minor child in their custody, neither it can be said that the welfare of the child is safe in the custody of such persons who are denying the child his parentage.

16. In a patriarchal society, the whole future of the child is in jeopardy whose parentage is made doubtful or who is alleged to be an illegitimate child. The persons who are depriving the child his parentage are making his existence in the society precarious, making his future dark and are depriving him of all the respectability which a person commands in the patriarchal society on the basis of his parentage. The respondents having denied the parentage of the child have deprived him of a very valuable right to live with respectability in the society. It cannot be imagined that the future and welfare of the child is safe with such respondents. The respondents have cruelly behaved with the mother by depriving her of the company of her minor son, particularly when the respondents are themselves making allegations that the minor child born to Smt. Vidyawati was her illegitimate son, once the child is denied, his or her parentage, all the relations of the child through his father cease to exist. If a child has no father, he cannot certainly have grand father. In the present day concept a person can claim himself to be the father of a child only when he or she been born out of the wedlock of his legally wedded wife. If a child is alleged to be born out of the marital relationship of the mother with some other person, such a child will be called illegitimate child in the context of the present day man dominated society.

17. The relationship of the mother with her child is irrevokable in the world. The relationship of mother and child is a reality and human conduct has proved it that the affection which a mother can provide to her child nobody else can provide. In the facts of the present case when Sri Ram Bali Tiwari is not coming forward to claim that Tribhuwan Tiwari minor child is his son, Sri Shiv Kumar Tiwari; the father of Sri Ram Bali Tiwari has no locus to claim that he is the grand father of the child. Even otherwise, Sri Shiv Kumar Tiwari has no valid right to keep Tribhuwan Tiwari in his custody. Sri Shiv Kumar Tiwari has himself stated in his counter affidavit that

Tribhuwan Tiwari is not born out of the valid wedlock of Smt. Vidyawati and Ram Bali Tiwari. With these allegations, Sri Shiv Kumar Tiwari has neither any moral right nor any legal right to keep Tribhuwan Tiwari in his custody.

18. The facts of this case have clearly made out that the mother of the child Smt. Vidyawati has been wrongly deprived of her valuable right to keep her son with herself. She has been illegally deprived of the custody of the child by the respondents. The facts also reveal that the respondents were illegally keeping Tribhuwan Tiwari in their custody for which they have no rights and this illegal detention of Tribhuwan Tiwari has caused mental torture to the mother of the child namely Smt. Vidyawati. She is entitled to keep the custody of the child as well as she is entitled for her costs for the mental torture, she had to suffer due to illegal acts of the respondents in depriving her from the custody of her son. On the allegations made by the respondents they cannot claim the custody of the child.

19. Keeping in mind, the over all welfare of the child and his future, Smt. Vidyawati, the mother of the child is the only proper person in the facts of the case who is entitled for the custody of the child at present. Accordingly, the present writ petition succeeds and is allowed with costs. The operative portion of the judgment has already been dictated by me in the open Court on 21.1.1993. The reasons dictated herein above will form part of the said judgment. However, I have noticed that in the operative portion, there are two typographical errors. In the name of Sushri Sadhana Upadhyaya "Mrs." has been wrongly typed, it should be M/s. and it was directed that if the respondents do not deposit the costs within two months, the Registrar of the Court will recover the same from the respondents as fine. Instead of words "two months" by mistake "two weeks" has been typed. These two typographical errors are accordingly corrected in the operative portion of the judgment.