(1982) 02 DEL CK 0019

Delhi High Court

Case No: Criminal Writ No. 82 of 1982

Smt. Nandita Virmani		APPELLANT
	Vs	
Raman Virmani		RESPONDENT

Date of Decision: Feb. 19, 1982

Hon'ble Judges: Prakash Narain, C.J; S.S. Chadha, J

Bench: Division Bench

Judgement

Prakash Narain, C.J.

The petitioner and the respondent were married on January 1, 1975 at Delhi, For some time they lived abroad but since September 1976 have been living at Delhi. A son was born out of the wedlock on January 24, 1977. It seems that the married life of the parties has been a stormy one. According to the petitioner she has been subjected to physical and mental cruelty by the respondent that the respondent loses his temper and, in the words of the petitioners, he "works himself up to a state of frenzy using foul language" against the petitioner and her parents. According to the respondent the petitioner completely neglects the normal duties expected of a wife or a mother which results in friction between the parties. It is neither necessary nor desirable that we go into the allegations and counter-allegations. Suffice it to say that the couple is unable to lead a peaceful normal married life. The petitioner alleges that she often been given corporal beating by the respondent which the respondent denies. In any case, it is obvious that on July 12, 1981 some incident took place, and we do not say who was at fault, resulting in a grave situation arising between the husband and wife. On July 13, 1981, according to the petitioner. She was turned out of the house by the respondent but, according to the respondent the petitioner left the house to stay with the parents. Their son remained in the custody of the respondent. We say that the son remained in the custody of the respondent without, in any way, dealing with the rival contentions of the parties as to why the son remained with the respondent. The petitioner wanted the custody of the child but the respondent was not willing to allow that. The child was as on July 13. 1981 under 5 years of age but was going to school. It appears that the

respondent either under a genuine belief and having genuine apprehension or a misguided belief and ill-founded apprehension came to the conclusion that the petitioner may forcibly take her son away with her from the school. The relationship between the parties had deteriorated to such an extent that instead of acting in any other acceptable manner the respondent filed a suit for injunction in the civil courts at Delhi on July 20, 1981 seeking a permanent injunction against the petitioner for restraining her from removing the child and taking him away with her. An application under O. 39. Rr. 1 and 2, C.P.C. was also moved seeking a temporary injunction restraining the petitioner from removing the child from the custody of the respondent till the final decision of the suit. Notice of the application was ordered for July 24, 1981. On that date the petitioner put in appearance in the court of Shri V. K. Jain. Sub-Judge 1st Class, Delhi, and made a statement to the effect that she will not remove the child physically without due process of law during the pendency of the suit. Shri V. K. Jain, Sub-Judge 1st Class, tried to have the dispute reconciled in chamber but her efforts were not fruitful. The respondent however, in view of the undertaking given by the petitioner in the civil court did not press his application for temporary injunction. An interim arrangement to enable the petitioner to see her son ad collect her clothings from her husband''s house was worked out by Shri V. K. Jain on July 31, 1981 and it was duly recorded. Issues were also framed in the suit on the same date by the Sub-Judge. According to the petitioner when she went to the respondent''s house to meet her child, she was virtually prevented from meeting him and she some back unhappy and frustrated. It is in these circumstances that she has moved this court under Art. 226 of the Constitution for issue of a writ of habeas corpus or in the nature of habeas corpus to get custody of her minor child.

2. The petition came up before us on August 12, 1981 when we issued notice to the respondent to show cause why rule be not issued, as prayed by the petitioner, and also directed production in court of the minor child on August 14, 1981. On that date the respondent put in appearance personally as well as through counsel. The child was also produced. Reply to the notice to show cause was also filed.

3. We first made an effort to see if it was possible made an bring about some sort of a reconciliation between the parties. We talked to the parties in Chamber and also tried to talk to the child in the presence of his parents. We made out own observations regarding the behavior of the child. After we had talked to the parties, we adjourned the hearing to September 8. 1981 to enable the parties to reconcile their differences and did not pass any order as to the custody of the child least it should jeopardizes chances of reconciliation. We also requested the counsel to lend their good offices towards reconciliation. On September 8. 1981 we again made on effort at reconciliation which the parties had not been able to bring about on their won. Taking note of the serious human problem which merited solution, we even talked to the parents of the petitioner and the respondent and mooted certain suggestions for reconciliation. We are glad to note that the parties were quite responsive to our suggestions and in that context made an agreed order with

regard to the custody of the child. The respondent agreed to hand over the custody of the child to the mother, the petitioner, for a week. As at that stage the respondent had apprehensions that health of the child may be put into jeopardy for he apprehended that the petitioner would not be able to look after the child, we adjourned the hearing for further directions to September 16, 1981. On that date again with the consent of the parties and their counsel the custody of the child was continued with the mother and the case was adjourned for further hearing to September 29, 1981. This was done in order to enable us to assess whether the apprehensions of the respondent or his allegations against the petitioner were genuine or imaginary. We were also hopeful that in his way we may be able to persuade the parties to again resume normal marital relations. On the adjourned date we made further efforts to see if we could bring the parties together in the interest of the child if not in their respective interests. Therefore, with their consent we worked out a formula by which the child could visit the father also and the father, mother and the son could spend some time together. In order to assess whether this experiment worked out with the consent of the parties we adjourned the hearing to November 2, 1981. On that date on joint request the matter was again adjourned to November 18, 1981. All efforts at reconciliation failed. There was bitter fight between the father and the mother for the custody of the child. According, we decided to proceed with the hearing of the case. The petitioner moved an application Criminal Miscellaneous No. 1654 of 1981, of the leave to amend the writ petition and the respondent filed Criminal Miscellaneous No. 1646 of 1981 for restoration of status quo ante with regard to the custody of the child before proceeding to hearing. We gave notice of the two applications to the respective opposite parties giving them an opportunity to file their respective replies. The case was ordered to be listed on December 11, 1981. On that date as one of us was unavoidably absent, the hearing had to be adjourned to December 17, 1981. On the adjourned date at the request of the parties the hearing was adjourned to January 6, 1982. It was ordered that the custody of the child would continue to be with the mother. When we assembled on January 6, 1982, learned counsel for the petitioner withdrew his application. Criminal Misc. No. 1654 of 1981, by which he sought to amend the petition, Leave having been granted, the application was dismissed as withdrawn. The hearing of Criminal Misc. No. 1646 of 1981, moved by the respondent was adjourned. We fixed January 12, 1982 for hearing of the case. On that date the matter could not be taken up for diverse reasons and so, the hearing was adjourned to January 27, 1982.

4. There have been lengthy and elaborate arguments addressed by learned counsel for the parties on various facets of the case. We shall presently set out all those points. We might, however, notice that in the meanwhile the petitioner has filed a petition in the court of a District & Sessions Judge, Delhi, under the provisions of the Guardians and Wards Act, 1890, read with the provisions of the Hindu Minority and Guardianship Act, 1956. Notice of this applications has been served on the

respondent. Indeed, the respondent had filed a caveat in the court of the District & Sessions Judge. Delhi, apprehending that the petitioner may file a petition under the Guardians and Wards Act. The parties have put in appearance and proceedings under the said Acts are pending before the District & Sessions Judge, Delhi.

5. The points which have been debated and which arise for consideration in the present case are these :-

(1) Whether a petition under Art. 226 of the Constitution of India for custody of a minor child is maintainable or should be entertained, particularly in view of the fact that the remedy under the Guardians and Wards Act and the Hindu Minority and Guardianship Act is available ?

(2) If a petition is maintainable, then in what circumstances can a writ of habeas corpus or in the nature of habeas corpus be issued ?

(3) If a petition under Art. 226 of the Constitution is maintainable, whether it is the legal right of either parent or the interest and welfare of the minor which should be the predominant factor in deciding the matter ?

(4) Whether mala fides of the petitioner in the circumstances of the present case disentitle her to relief by invoking Art. 226 of the Constitution ?

6. Article 226 of the Constitution empowers every High Court to issue to any person authority, including in appropriate cases, any Government, within its respective territory, orders or writs, including writs in the nature of habeas corpus etc. for the enforcement of any of their rights conferred by Part III of the Constitution and for any other purpose.

7. The writ jurisdiction of the High Court as is now well-settled, is a jurisdiction under which the High Courts are under a duty and have the power to secure and ensure that fundamental rights guaranteed by Part III of the Constitution are protected and are a live reality and not mere paper rights. Further, Art. 226 of the Constitution empowers the High Courts to interfere, wherever there is injustice or oppression or flouting of basic human rights and statutory or even social imperatives. In our considered view it cannot be said as a broad proposition that because of the existence of the remedy under the Guardians and Wards Act or the Hindu Minority and Guardianship Act the remedy under Act, 226 of the Constitution is not available to secure custody of a minor child. It has to be borne in mind that in petitions under Art. 226 for the custody of a child the dominant factor is not the enforcement of the rights of warring parties but the protection of the rights of a child as a human being Art. 21 of the Constitution guarantees to every person in India, be he a citizen or not, protection of his life and personal liberty, these cannot be taken away except according to the procedure established by law. In petitions under Art. 226 of the Constitution the High Court is not concerned so much with the question of guardianship .It is more concerned with the question of the life and personal liberty

of the child. In this latter part of the twentieth century, life and personal liberty do not and cannot mean being merely free from bondage. It does not merely mean the right to remain alive. The concept of life and personal liberty postulates in a nut-shell the right to lead a life according to one''s own choice so long as that way of life is not prohibited either by law or is not in conflict with similar right of others leading their life according to their own norms. In other words, in a society the concept of life and liberty has to be the right to lead such life and to live in such manner as may be best conducive to the improvement of one''s own faculties and enjoyment so long as it does not interfere with other people also leading their life in their own way. Of course, if there is a law that law must be obeyed. In that context, the custody of a child has to be looked at from what is in the best interest of the child irrespective of the rights asserted under law by any of the warring parties who may want to have the custody. We purposely refrain from making any observations with regard to guardianship as that is a matter which will be in the domain of the District & Sessions Judge before whom the petition for guardianship is pending, as noticed earlier.

8. Mr. C. L. Joseph, learned counsel appearing for the petitioner, submitted that if the paramount consideration is the welfare of the minor and not the legal rights of one or the other party, as has been observed by the Supreme Court very recently in Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor, SLP (Crl.) No. 1073 of 1981 : 1982 Cri LJ 580, we may stay the hearing of this matter till the guardianship question is determined by the appropriate court. One Dr. (Mrs.) Veena Kapoor had filed a petition under Art. 226 of the Constitution in the High Court of Punjab and Haryana asking for the custody of her 1 1/2 years old child who was allegedly in the illegal custody of his father, the respondent Shri Varinder Kumar Kapoor. This petition was dismissed by the High Court. Against that order Mrs. Kapoor filed a Special Leave Petition. In those proceedings the Supreme Court observed, "It is well-settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party." The Supreme Court noticed that the High Court without adverting to this aspect had dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal. The Supreme Court before ordering custody to one party or the other directed the District & Sessions Judge, Chandigarh, to take evidence on the question as to what will be in the best interest of the minor and make a report to the Supreme Court. As an interim measure, the child was put in the custody of the mother. Mr. Joseph submitted that we may follow the same procedure, particularly in view of the fact that the guardianship proceedings are already pending before the District & Session Judge, Delhi. Mr. Saharaya, appearing for the respondent had opposed the submission and had contended that in view of the pendency of the guardianship of proceedings, the present petition should be dismissed, status quo ante vis-a-vis the custody of the child restored and that the District & Sessions Judge, Delhi, be left to decide the question. We do not agree to

the propositions of either of the counsel. However, taking note of the pendency of the guardianship proceedings we refrain from making any observations in this judgment either with regard to the ultimate welfare of the child or the fitness or unfitness of the petitioner or the petitioner to be the guardian or even to have custody. On this, Mr. Saharaya submits that we should at least decide whether a petition under Art. 226 of the Constitution is maintainable and, if so, in what circumstances. We, Therefore proceed to deal with these aspects.

9. The Guardians and Wards Act, 1890, was primarily enacted to consolidate various Acts then in force keeping in view the personal law of diverse communities in India. It, however, did not encroach upon the jurisdiction of the Courts of Wards and did not take away any powers vested in the High Courts. A "minor" under the Act has been defined as a person who, under the provisions of the Indian Majority Act, 1975, is to be deemed not to have attained his majority. A "guardian" has been defined as a person having the care of the person of a minor or of his property. or of both his person and property. Section 6 of the Act provides that no provision in the Act shall be construed to take away or derogate from any power to appoint a guardian of a minor''s person or property, or both, which is valid by the law to which the minor is subject. Section 7 gives power to the court that if is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declare a person to be such a guardian. Section 8 lays down that no order u/s 7 will be made except on the application of the person desirous of being or claiming to be the guardian of the minor or any relative of friend of the minor or the Collector of the district in which the minor ordinarily resides or in which the has property or the Collector having authority with respect to the class to which the minor belongs. Section 9 deals with territorial jurisdiction of the court. Section 10 lays down in which manner an application is to be made and what all is to be stated in the application. Section 11 provides for the procedure on admission of such an application. Section 12 gives power to the court to make interlocutory order for production of a minor and interim protection of his person and property. Section 17 enjoins upon the court to have due regard to the personal law of the minor and specially take not of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligence preference, the court is directed to consider that preference also in coming to the final conclusion. Further, no person can be appointed a guardian against his own will.

10. The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a "minor" to be a person who has not completed the age of eighteen years. "Guardian "has been defined as meaning a person having the care of the person of a minor or of his property or of both his person and property and includes - (i) a natural guardian, (ii) a guardian appointed by the will of the minor''s father or mother, (iii) a guardian

appointed or declared by a Court, and (vi) a person empowered to act as such by or under any enactment relating to any court of words. "Natural guardian," according to this Act means any of the guardians mentioned in Section 6. Section 6 says that the natural guardians of a Hindu minor, in respect of the minor''s person as well as in respect of the minor''s property (excluding his or her undivided interest in joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 lays down that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation protection or benefit of the minor''s estate but the guardian can in no case bind the minor by a personal covenant. Sub-section (5) of Section 8 lays down that the Guardians and Wards Act, 1890, shall apply in certain circumstances. Section 13 of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court the welfare of the minor shall be the paramount consideration. Indeed Sub-section (2) of Section 13 lays down that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare so the minor. This section is complementary to Section 17 of the Guardians and Wards Act which lays down 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.

11. A mere reading of the provisions of the two Acts makes it obvious that the welfare of the minor predominates to such an extent that legal rights of persons claiming to be the guardians or claiming to be entitled to custody will play a very insignificant role in a determination by the court. We are in good company in saying so. (See Chander Prabha Vs. Prem Nath Kapur, and Rosy Jacob Vs. Jacob A. Chakramakkal,).

12. Mr. Saharaya does not really contest this proposition. What he contends is that the father being the natural guardian of his son, the custody of the father cannot be termed as illegal or unlawful restraint on the minor. In that context no writ of habeas corpus can issue. His contention is that before a writ of habeas corpus can issue it has to be shown that there is either unlawful detention or custody or there is imminent or serious danger to the person detained, particularly if he is minor. Both Hindu Law and Hindu Minority and Guardianship Act have recognised that among natural guardians the father has the first preference. Merely because it is said that ordinarily the custody of a child under five years of age should be with the mother would not justify the issue of writ of habeas corpus where the child was little under five years when the petition was filed and today, in any case, is over 5 years of age. According to him the father can be removed from the guardianship of the child and can be prevented from discharging his duty and trust only if he is removed from

guardianship u/s 7 of the Guardians and Wards Act. To remove the child from the custody of the father it has to be held that the father is unfit to have the custody of the child keeping in view all the circumstances of a case. Indeed, he relies on Section 24 of the Guardians and Wards Act which lays down that the guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires. Learned counsel in support of his contention first referred to Raddy v. Krishna, (1886) 2nd 9 Mad 391. In this case a Brahman boy, 16 years of age, having left his father''s house went to and resided in the house of a Missionary, where he embraced Christianity and was baptized. In a suit by the father to recover possession of his son from the Missionary, it was held that the question whether the boy was a minor had to be decided according to the Minority Act and not by Hindu Law. The father was given the custody of the son. We may, however, with advantage quote what their Lordships noticed with approval being the observations in an earlier Calcutta case, "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 is illegally confined against his will. It is issued on behalf of the person illegally confined, and not issued for the purpose of lending the arm of law to any person claiming authority over him. It is only where the person confined is under any personal disqualification the guardian or protector is looked to, a 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." Relying on the above observations Mr. Saharaya says that inasmuch as the father is the rightful guardian the custody has to remain with him. In our view learned counsel''s reliance on these observations is misplaced. The crux of the decision is that the writ jurisdiction cannot be utilised for the purpose of lending the arm of that law to any person claiming authority over another. The writ jurisdiction is exercised to ensure the liberty of the person detained taking into consideration what is in his best interest. No doubt, in the state of law almost 90 years back the rights of guardians were more in prominence but then Arts. 14 and 21 of the Constitution were not available to citizens of India at that time.

13. In Sultan Singh Vs. B. Maya Ram Radha Swami, the Allahabad High Court was concerned with on application u/s 491(1) of Cri.P.C. as then in force. Dealing with an application under that section a learned single Judge observed that an application u/s 491(1)(b) of the Code of Criminal Procedure is not appropriate if it is used as a cheap and quick remedy as against normal judicial process. It was in that context that the learned single Judge observed that power u/s 491(1)(b) is to be exercised only in cases of urgency or where there is danger to life of a minor. Once again, the power under Art. 226 of the Constitution or the power u/s 491(1)(b), Cr.P.C. it has to be borne in mind, are distinct and different powers.

14. Reliance was next placed on Mt. Haidari Begum Vs. Jawad Ali . This was also an application u/s 491 of the Code of Criminal Procedure. The learned single Judge

made the same observations as in Sultan Singh Vs. B. Maya Ram Radha Swami, . Our comment is the same. These pre-Constitution cases when the concept was entirely different and the jurisdiction were entirely different. In the same way reliance by Mr. Saharaya on D.P. Sampath Vs. Govindammal and Others, , and Gopal Ji and Others Vs. Shree Chand and Another, are misplaced. Proceedings u/s 491, Cr.P.C. are of a different nature. It is correct that any determination u/s 491, Cr.P.C. or Art. 226 of the Constitution would be of an interim nature as the parties must in the ultimate analysis approach the civil Courts under the Guardians and Wards Act or any other relevant law. Nonetheless the power of the court to intervene in appropriate cases for the welfare of the minor cannot be disputed. We may with advantage notice a decision of the Madhya Pradesh High Court in Smt. Veena Agrawal Vs. Shri Prahlad Das Agarwal, . In this case a mother sought the custody of her child by issue of the writ of habeas corpus. The custody was denied to her by her husband. No doubt, the child in this case was a babe in arms but the principle enunciated was that the sole consideration in ordering custody to be taken away from one parent and being given to another is the welfare of the minor. Reference was make to Section 6 of the Hindu Minority and Guardianship Act where the legislature has even enjoined that ordinarily a son under the age of 5 years should remain in the custody of the mother.

15. A considerable amount of debate ensued as to what is the meaning of the term "ordinarily." We find that thee is no scope for debate. When the legislature says "ordinarily" it does not mean "definitely." What the Legislature seeks to convey is that other things being equal a child under 5 years of age should be in the custody of the mother. It does not say that the child over 5 years must be in the custody of the father. Indeed, we must emphasise the obvious distinction between guardianship and custody. The father may continue to be the guardian and yet the custody may be given to the mother. When custody is given to the mother, the paramount consideration is the welfare of the child. The rights of the parties may be taken into consideration but the paramount consideration has to be the welfare of the child. Both the father and the mother of the child by nature and under injunction of law have to devote themselves to the welfare of the child. The capacity of the father or the mother would also be a relevant factor in deciding whether custody should or should not be given to either party. This, however, can only be done after full evidence is recorded which it is not possible nor desirable in the present proceedings, specially in view of the pendency of the guardianship petition filed by the mother. As we said earlier, we make no comments on this aspect because it might prejudice either of the parties in the guardianship court.

16. Keeping in view all the circumstances of the case and having had the benefit of personally observing the child both when he was in the custody on the father and now when he is in the custody of the mother, as also the impressions created on our mind by talking to the parties and their respective parents, we are not inclined to disturb the child at this juncture and restore the custody to the respondent.

Undoubtedly, when the petitioner came to court she could assert that ordinarily the custody of her child should have been with her. Though the child is just a little over 5 years now, we cannot treat him as a shuttlecock to be thrown from one house to the other.

We cannot persuade ourselves to disturb the child at this stage. The guardianship matter is in the Civil Court and we have no doubt that it will be decided expeditiously.

17. Mr. Saharaya then contended that the petition should be thrown out as the petitioner wanted to nullify the orders passed in the Civil Suit in the Court of Shri V. K. Jain, Sub-Judge 1st Class, Delhi. We are not able to understand the contention. The petitioner gave an undertaking not to take the custody of the child except in accordance with the procedure established by law. A petition under Art. 226 of the Constitution is, undoubtedly, a procedure established by law. She was entitled to move the guardianship court. In the situation in which she was placed by the respondent filing a suit for injunction against her a few days after the petitioner ceased to live in the matrimonial home could have persuaded her to approach this court in its writ jurisdiction. We do not find that to be mala fide.

18. Mr. Saharaya also says that the petitioner is dependent upon the charity of her father with whom she is staying. A daughter in distress can never be a burden on the father. If she is given shelter and succor by her parents it cannot be called charity. We are satisfied that looking after the child is not burden on the petitioner''s parents. Indeed, they welcome it. The child is happy in his present surroundings. To uproot him pending the hearing and decision of the guardianship case would not be justified.

19. Although very elaborate arguments were addressed, it is, as we have said earlier, neither necessary nor desirable that we comment on those arguments any further.

20. The result is that we make the rule absolute and direct that pending the decision of the guardianship case instituted by the petitioner custody of the minor child. Aditia, will remain with the petitioner. The respondent of course, is free to arrive at some arrangement with the petitioner, which we hope he will, to meet his son as often as is possible, or seek directions from the District Judge, Delhi.

21. Although we have said so earlier, we reiterate that any observation made by us with regard to the interest and welfare of the child and the desirability of the custody being with the father or the mother has been made only in the context of maintainability of the petition under Act, 226 of the Constitution and the interim relief, if any, that could be granted to the petitioner in view of the proceedings pending in the court of the District and Sessions Judge, Delhi. Nothing said by us should be taken to be a finding which can or will affect the proceedings in that court. We have only given interim custody to the petitioner in the interest and

welfare of the child. No orders could be passed giving final custody as one does not know what the future may hold and what the future interest and welfare of the child may require to be looked into for appropriate orders being passed by a court in its Patria Parents jurisdiction.

22. In the circumstances of the case we leave the parties to bear their own costs of the present proceedings.

23. Rule made absolute.