

Allahabad High Court
Saksham Pathak (Minor) vs Vishal Dubey And 4 Others on 15 December, 2020
Bench: Suneet Kumar

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 2

Case :- HABEAS CORPUS WRIT PETITION No. - 467 of 2020

Petitioner :- Saksham Pathak (Minor) Respondent :-

Vishal Dubey And 4 Others

Counsel for Petitioner :- Shambhawi Shukla, Dileep Kumar (Senior Adv.), Rajrshi Gupta Counsel for Respondent

:- Sunil Kumar Singh, Anil Kumar Srivastava, Sr. Advocate, Sunil Kum

Hon'ble Suneet Kumar, J.

1. Heard Shri Dilip Kumar, learned Senior Counsel assisted by Sri Rizwan Ahmad, learned counsels for the petitioner and Shri Anil Kumar Srivastava, learned Senior Counsel assisted by Shri Rahul Shukla, learned counsels for the respondents.
2. The instant petition has been filed for custody of the corpus (Saksham Pathak) through Amit Kumar Pathak (FATHER)1. The corpus is in the custody of the respondents.
3. The facts giving rise to the instant petition filed for writ of habeas corpus is that A-1 is the only natural and legal guardian of the corpus aged about four years. A-1 is in the employment of Central Reserve Police FORCE2; he came to be married to Archana, daughter of Sri Vinod Dubey, on 31 January 2013. After marriage, wife of A-1 started living at the matrimonial house at village Merhi Dudhi, Tehsil, Bharthana, district Etawah. A-1, at intervals, used to visit his native village on leave being sanctioned by the CRPF. From the wedlock, corpus was born on 02 October 2016, at Etawah. In the process of delivery, Archana's physical condition became critical, she was shifted to Intensive Care Unit (I.C.U.), and was diagnosed of cardiac disorder by the attending doctors, she was advised to take treatment from a specialist. On 23/24 November 2016, Archana was brought by her brother (second respondent) to consult Heart Specialist at district Ujjain (Madhya Pradesh) at her home district. Thereafter, Archana was shifted for consultation and treatment to Rhythm Heart Institute, Vadodara, Gujarat, on 5 August 2017, by A-1 and her brother (second respondent). On

improvement, Archana returned to her matrimonial home and continued treatment, however, on 11 October 2018, she succumbed to a massive heart stroke. At the relevant time, A-1 WAS posted at Meerut and was taking training for United Nation Mission, being a regular constable of 217 Battalion, Chhattisgarh. A-1 participated in the funeral of Archana at his native village. Archana's mother, brother and two sisters i.e. second to fifth respondents participated in the funeral.

4. It is urged by the learned counsel for the petitioner that the fourth respondent Sapna Dubey, aged about 27 years, continued to stay at the matrimonial home of Archana on the pretext that she would be able to look after the infant child being his mausi. It appears, thereafter, in January 2019, the fourth respondent along with the corpus returned to Ujjain on the pretext that the grand mother (nani) wanted to meet and see the child. It is urged that in March, during Holi, A-1 WENT to take the corpus back to his native village, but on the request of his in-laws he left the corpus there and directly went to his place of posting at Meerut after exhausting his leave. In the month of September 2019, A-1 again visited his native village and requested his in-laws to bring back his son during the leave period. It appears that the corpus was regularly visiting the native village of A-1 along with the fourth respondent and at times was residing at district Ujjain, as A-1 WAS not available having regard to the nature of his duty. On 5 November 2019, A-1 came to be posted at 139 Battalion at Delhi. At that relevant time the fourth respondent along with the corpus was at the native village of A-1 at district Etawah. It appears that the fourth respondent desired to live with the corpus and marry A-1 as she would be the most appropriate person to look after the infant child.

5. It is submitted that the desire of marriage by the respondents was expressed at a time when the second marriage proposal of A-1 WITH Varsha was at a mature stage. Varsha is a well educated lady and her parents had agreed for the second marriage and also to look after the child. The fact that the marriage negotiations of A-1 WITH Varsha was going on and was at a mature stage was fully known to the fourth respondent and the other in-laws.

6. It is submitted that during this point of time the corpus was forcefully taken away by the second and fourth respondents from the custody of A-1 and his family members, thereafter, the respondents insisted and pressurized that A-1 should marry the fourth respondent. Finally, on 30 June 2020, during the pandemic COVID-19 the marriage of A-1 WAS solemnized with Varsha, daughter of Pradeep Kumar at Etawah. The function was kept low profile due to restriction during lockdown. It is submitted that the in-laws of A-1 (respondents except respondent no. 1) had also attended the marriage ceremony. It is further submitted that the second, fourth and fifth respondents are unmarried, the first respondent, the eldest brother-in-law of A-1 WAS married, but has since been convicted for the murder of his wife by the Additional Sessions Judge, Nagda, District Ujjain, under section 302 Indian Penal Code (I.P.C.), whereas, the second, fourth and fifth respondents though charged for the offence were acquitted. First respondent is facing life term.

7. In this backdrop, it is submitted by learned counsel for the petitioner that corpus is in the illegal detention/custody of the respondents, who admittedly are not the natural guardian. A-1, having due regard to the nature of his duty, has since been posted at Delhi and being the only natural guardian is entitled to the custody of the corpus. The child has been removed against the wishes of A-1 and his family by the fourth respondent.

8. The respondents have put in appearance and filed counter affidavit. It is submitted that first and second respondents are maternal uncle (mama) of the corpus, the third respondent is grandmother (nani), whereas, fourth and fifth respondents are mausi of the corpus and reside at Nagda, district Ujjain. It is further stated that the second, fourth and fifth respondents are unmarried, whereas, the first respondent was earlier married to Pinki, but thereafter the first respondent has not remarried. It is further stated that Archana, the sister of first, second, fourth and fifth respondents, was married to A-1 and the corpus was born from the wedlock at district Etawah (Uttar Pradesh). Archana, unfortunately, died on 11 November 2018, at her in-laws place. It is further stated that after the ritual on the death of their sister (Archana) the custody of the child was handed over by A-1 to the respondents. It is further stated that since then the corpus is residing with the respondents and they are looking after his welfare. A-1, nor his family members, ever inquired about the well being of the corpus. It is further submitted that the corpus, presently is aged about 4 years, and has been admitted to a play school, namely, Rising Kids Play School, Nagda, Ujjain. It is pleaded that since 11 November 2018, A-1 never visited the house of the respondents nor inquired about the child. It is further stated that once or twice the fourth respondent went and stayed at the native village of A-1 along with the corpus but after a couple of days she returned with the corpus. It is further submitted that corpus is happy and willing to stay with the respondents, further, the corpus treats the forth respondent as his mother and addresses her as 'Archana'. It is further submitted that the second respondent is a manager of a company at Ujjain and earns at Rs. 25000/- per month; the fifth respondent is working as Primary Teacher in Lakshya International School at Ujjain. It is further stated that the corpus is the only child in the family of the respondents and all the respondents jointly take care of the welfare of the child. The fourth respondent undertakes to take the responsibility of the corpus.

9. It is alleged that A-1 never took care of his wife nor did he bear the expenses of the treatment of his wife. It is admitted that the respondents participated in the last rites of Archana, thereafter, returned to Ujjain with the minor child. It is further admitted that the first respondent was convicted for the murder of his wife by the competent court on 10 July 2019 and sentenced to life imprisonment. It is submitted that A-1, having due regard to the nature of his employment and duty, is not in a position to look after the corpus, further, welfare of the child will be seriously neglected after the second marriage of A-1.

10. Rival submissions fall for consideration.

11. The question that falls for consideration is whether the writ of habeas corpus filed by the father (A-1) of the corpus is entitled to seek custody of the minor child from the respondents. Further question falling for consideration is whether handing over the custody of the child to A-1 is not conducive to the interest and welfare of the minor child.

12. It would be apposite to briefly examine the law with regard to the custody of the minor child in a petition seeking writ of habeas corpus.

A. Scope of Habeas Corpus Petition:

13. Guardians and Wards Act, 1890, is a secular law regulating questions of guardianship and custody for all children, irrespective of their religion. Hindu Minority and Guardianship Act, 1956, is applicable to persons who is a Hindu, Buddhist, Jain or Sikh by religion. Hindu Marriage Act, 1956, authorises courts to pass interim orders in any proceedings thereunder, with respect to custody, maintenance and education of minor children.

14. The term 'custody' is not defined in any Indian Family Law, whether secular or religions. The law governing custody is closely linked with that of guardianship. As against guardianship, the term custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor.

15. The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from illegal or improper detention. The writ also extends to restore the custody of a minor to his guardian when wrongfully deprived of it. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

16. It is well established that in issuing the writ of habeas corpus in the case of infants, the jurisdiction which the court exercises is an inherent jurisdiction as distinct from statutory jurisdiction conferred by any particular provision in any special statute. In other words employment of the writ of habeas corpus in child custody cases is not pursuant to, but independent of statute.

17. In *Gohar Begum vs. Suggi @ Nazma Begum and others*³, the Supreme Court in the matter of custody by the unwed mother of her illegitimate child had directed that the person detaining the child had no legal right to the custody and her refusal to make over the child to the mother resulted in an illegal detention of the child. The Court held that the fact that the mother had a right to take remedy under the Guardians and Wards Act, 1890, is no justification for denying her right of seeking legal custody, being the natural guardian, she is entitled to maintain the writ petition. The Court held that the dispute as to the paternity of the child is irrelevant. (Refer- *Syed Saleemudding Versus Dr. Ruksana and other*⁴)

18. In cases where disputed questions of fact are involved either between the natural guardians or any other person, the Court has been reluctant in interfering in writ jurisdiction.

19. In *Dr. Veena Kapoor vs. Varinder Kumar Kapoor*⁵, the issue of custody of child was between natural guardians who were not living together. The Supreme Court directed that District Judge concerned to take down evidence, adduced by the parties and sent report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given custody.

20. In *Rajiv Bhatia vs. Government of NCT of Delhi and others*⁶, the habeas corpus petition was filed by the mother of a girl child, alleging that her daughter was in illegal custody of her husband's elder brother. The elder brother relied on an adoption deed. The plea taken by the mother in the Supreme Court that it was a fraudulent document. In the given facts, Supreme Court held that the

High Court in writ jurisdiction was not entitled to examine the legality of the deed of adoption and then come to a conclusion one way or the other with regard to the custody of the child.

21. Habeas corpus proceedings is not to justify or examine the legality of the custody. The proceeding is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued wherein the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody the power of the High Court in granting writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In child custody matters, the writ of habeas corpus is maintainable in exceptional cases where it is proved that the detention of the minor child by a parent or others was illegal and without any authority of law. (Refer-Tejaswini Gaud Versus Shekhar Jagdish Prasad Tewari⁷).

22. In child custody matters, ordinary remedy lies only under the Hindu Minority and Guardianship Act, 1956, or the Guardians and Wards Act, 1890, as the case may be. There are significant differences between the enquiry under the Guardians and Wards Act, 1890, and the exercise of powers by the writ Court which is of summary in nature. What is important is the welfare of the child. In the writ Court, rights are determined only on the basis of affidavits. Where the Court is of the view that a detailed enquiry is required the Court may decline to exercise extraordinary jurisdiction and direct the authorities to approach the competent Civil Court/Family Court. It is only in exceptional cases the rights of the parties to the custody of the minor will be determined and exercised in extraordinary jurisdiction on a petition of habeas corpus.

B. Welfare-Paramount Consideration:

23. Paramount consideration regarding custody or other issues pertaining to a child is "welfare of the child". It is not the welfare of the father, nor welfare of the mother or guardian. It is the welfare of the minor and minor alone, irrespective of the claims of the parties to the custody. (Refer- Sheoli Hati vs Somnath Das⁸)

24. The expression "welfare" used in the statute has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court, as well as, its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae (supreme guardian/protector) jurisdiction arising in such cases. However, legitimate the claims of the parties are, they are subject to the interest and welfare of the child. (Refer- Gaurav Nagpal Versus Sumedha Nagpal⁹, Surindar Kaur Sandhu vs Harbax Singh SANDHU¹⁰)

25. In Nil Ratan Kundu vs. Abhijit KUNDU¹¹, Supreme Court held that the paramount consideration in custody of the child is welfare of the minor and not the legal right of the particular party. Section 6 of the Hindu Minority and Guardianship Act, 1956, cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. The custody cases cannot be decided on

documents, oral evidence or proceeds without reference to "human touch". The human touch is the primary consideration for the welfare of the minor, since other materials may be created either by the parties themselves or on the advice of counsels to suit their convenience.

26. A court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. A Court while dealing in such matters is neither bound by the statute nor by strict rules of evidence or procedure nor by the precedents. In selecting proper guardian of a minor the court is exercising *parens patriae* jurisdiction and is expected and bound to give due weight to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable consideration. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor. (Refer: *Mausami Moitra Ganguli vs. Jayanti GANGULI*¹²)

27. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the minor are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a child, irrespective of the rights conferred under the statutory provisions or the personal laws. (Refer-*Gaytri Bajaj Versus Jiten BHALLA*¹³ and *Mamta Versus Ashok Jagannath BHARUKA*¹⁴)

28. In *Rosy Jacob vs. Jacob A. CHAKRAMAKKAL*¹⁵ Supreme Court held that the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors. The children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their (minor) children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society.

29. In *Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker JOSHI*¹⁶, the father of the children was facing charge under Section 498A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.

C. Discussion & Conclusion:

30. Having briefly examined the law pertaining to custody of minor child, I would now revert to the facts of the instant case.

31. The facts, inter se, parties are not in dispute. The rights of the contesting parties can be determined on the basis of affidavits. The Court in the given facts is not required to make a detailed enquiry in the backdrop of the facts detailed in the earlier part of the order. I am of the view that the writ of habeas corpus is maintainable.

32. A-1 father of the corpus is the natural guardian of the child. The respondents are in-laws of A-1 and are not the natural guardians. The natural guardian is pitted against a third party. In other words the child is in illegal detention of the respondents. The onus, therefore, is upon the respondents to prove as to why it is not conducive to the welfare and interest of the child in handing over the custody to A-1.

33. The point to be considered is the custody of the minor child which solely rests upon the welfare/best interest of the child. The legal rights of the contesting parties, including, the parent would not bind the Court. It is admitted to the respondents that A-1 is the father of the child born from the deceased Archana-sister/brother/daughter of the respondents. The child presently is aged about four years. A-1 is gainfully employed with the CRPF. He has contracted second marriage with Varsha.

34. A-1 is presently posted at Delhi. The first respondent is a convict facing life term for murder of his wife. The second, fourth and fifth respondents are unmarried; second and fifth respondents are gainfully employed, whereas, the fourth respondent is unemployed. The corpus is the only child amongst the respondents, probably for this reason they feel attached to the minor child. The child has recently been admitted to a play-way pre-school by the respondents. The child appears to be attached to the fourth respondent and addresses her as his mother.

35. The respondents, barring, the third respondent (nani) are present in the Court. The first respondent is on parole to attend the proceedings. The respondents have produced the child, pursuant to the direction of the Court. A-1, Varsha and grand mother (dadi of the corpus) are also present.

36. The respondents press for the custody of the child stating that the welfare of the child would be compromised and neglected by A-1 having regard to the transferable nature of employment; coupled with the fact that A-1 has contracted second marriage. In other words, the child would be neglected by the "step mother". The fourth respondent made a statement, in the presence of the respective counsels, that the child should continue in her custody until the child attains the age of ten years. The respondents would take joint care of the child in all respect. The child thereafter could decide whether he wants to return to his father or continue to stay with the respondents. The fourth respondent on specific query admits that she does not have any legal right to the custody of the child but states that the welfare of the child, in the best interest, would be subserved with the respondents. The child has been in their custody for two years.

37. A-1 is able bodied, employed with the Central Paramilitary Force, he has the means and source to provide education to his child. A-1 comes from a large joint family having agricultural property. The child after the demise of his mother was taken care by the family at their native village at

Etawah. The child is intelligent, of happy disposition and agile. The child could write his name and that of his pre-school. The child has been taken care well by the respondents, by admitting him to a school recently, but that is not sufficient to claim custody. The moral and ethical values cannot be ignored. On query, the child could immediately spot his father in the crowded court. He readily went to his father and stayed with him throughout the proceedings. The child is familiar and attached to his father. It appears that the child has been in continuous touch with his father and his family as against the claim of the respondents. He identified his grandmother (dadi) in the Court.

38. It is not the case of the respondents that A-1 suffers from any vice that is detrimental to the interest of the child, or A-1 has indulged in domestic violence, or is not sensitive to the needs of the child, or is not responsive parent, or has a history of child abuse, substance abuse or suffers from psychiatric illness, or has any social issues with the child that would negatively impact the child. In contrast the child is comfortable with the father, he is not afraid of the parent and feels secure in his arms as is evident from his demeanour.

39. The law gives priority to parents where it comes to the custody of their children. However, another person (third person) can go to the Court and ask for custody. This kind of request for custody is not always related to bad behaviour by the parents. Some times, the child's well being requires a third person to have custody. The third person who wants custody must prove to the Court that this is in the interest of the child. This is not easy thing to do because the parents are often in the best position to ensure the well-being of their children. The third person must convince the court that the opposite is true. In the given facts, in particular, conviction of the first respondent for a heinous offence, the respondents have miserably failed to, prima facie, prove/show that the welfare of the child would seriously be jeopardised in the event of the custody being handed over to A-1. The plea that the child should continue in the custody with the respondent for the next six years is without any basis.

40. The learned counsel for the respondents finally submitted that the second marriage of A-1 WOULD not be in the best interest of the child. The step mother is likely to ignore the child. The argument sought to be advanced is based on assumption without any foundation being laid to that effect.

41. Second marriage does not disentitle a parent to the custody of the child, though, the second marriage of either of the parent is a factor to be considered while granting custodial rights. (Refer- Ather Hussain Versus Syed Siraj AHMAD¹⁷)

42. In *Lekha Versus P Anil KUMAR*¹⁸ Supreme Court held that remarriage of the mother cannot be taken as a ground for not granting the custody of the child to the mother. The paramount consideration should be given to the welfare of the child. The Court referred to the decision of the Madras High Court in *Sura Reddy Versus Chenna REDDY*¹⁹, wherein the court clearly laid down that a Hindu father has married a second wife is no ground whatsoever for depriving him of his parental right of custody. The father ought to be the guardian of the person and property of the minor in ordinary circumstances.

43. Having regard to the facts, circumstances and the material placed on record, the custody of the child cannot be permitted to continue any further with the respondents (third party). The respondents accordingly are directed to handover the child to A-1 (natural guardian) forthwith. To foster love and affection of all the family members, the respondents, except the first respondent, would have visiting right to meet and interact with the child at regular intervals preferably bimonthly at the place where the child resides on prior information to the parent of the child.

44. The writ petition is allowed.

Order date: 15.12.2020 KKM/S.Prakash