

(2013) 03 AHC CK 0108

In the Allahabad High Court

Case No : Civil Misc. Habeas Corpus Writ Petition No. 10996 of 2013

Baby Kavya Awasthi and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-03-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 156(3)

Citation : (2013) 5 ADJ 72 : AIR 2013 All 138 : (2013) 4 ALJ 532 : (2013) 97 ALR 904

Hon'ble Judges : N.A. Moonis, J

Bench : Single Bench

Advocate : S.D. Singh Jadaun, for the Appellant; Rajiv Lohan Shukla, for the Respondent

Final Decision : Allowed

Judgement

N.A. Moonis, J.—Heard learned counsel for the applicants, Sri Rajiv Lochan Shukla, learned counsel for the opposite party No. 2 and learned AGA and have been taken through the record. At the very outset, it revealed that the counter-affidavit filed on behalf of the respondent No. 3 is not in accordance with the Rules of the Court as the deponent has neither put the signature/thumb impression on any page of the counter-affidavit nor the Advocate has put his signature identifying the deponent while it is mandatory under the provisions of the High Court Rules to swear each and every paragraphs of the affidavit and the deponent has to put his signature/thumb impression. The person swearing an affidavit must be identified by the Advocate who is reasonably satisfied as to his identity. The striking feature of the counter-affidavit is that the Oath Commissioner has only put his seal without examining the contents of the counter-affidavit as to whether he has filled all the paragraphs of the affidavit and whether the deponent has put his signature/thumb impression and has been identified by the concern Advocate or not. This type of casual practice on the part of the Oath Commissioner is highly despicable and scornful. The Oath

Commissioner is not expected to discharge his duties in non-challans and insouciant manner by keeping on shelf the Rules of the Court. The counter-affidavit not being in accordance with Rules of the Court will not be treated as part of the record.

2. By means of the present petition under Article 226 of the Constitution of India, the petitioners have invoked extra ordinary jurisdiction of this Court with a prayer to direct the respondent No. 3 to produce the corpus/petitioner No. 1 namely Baby Kavya Awasthi and the corpus Baby Kavya Awasthi may be given to her natural mother the petitioner No. 2.

3. The aforesaid Habeas Corpus petition came up before another Bench of this Court on 1.3.2013. The Hon"ble Single Judge was pleased to issue notice to the respondent No. 3 to produce the corpus before this Court positively on 22.3.2013 fixing the date for disposal of the petition. The notice was directed to be served through Chief Judicial Magistrate concern.

4. Pursuant to the aforesaid order dated 1.3.2013, the respondent No. 3 with grand daughter Baby Kavya Awasthi is present before this Court. The learned counsel appearing on behalf of the respondent No. 3 has raised preliminary objection with regard to maintainability of the Habeas Corpus petition and has also filed counter-affidavit on behalf of the respondent No. 3. It is contended that the remedy for the petitioner No. 2 lies under the Guardianship & Wards Act. The grand father of the petitioner No. 1 is entitled to the custody in the best interest of her goodness and welfare under the circumstances of the case.

5. In order to find out whether there is such a bar to the entertainment of a writ petition, the Court will have to examine the facts and circumstances of each case and the redressal that is sought, though it is impossible to lay any hard and fast rule.

6. It is submitted by the learned counsel for the respondent No. 3 that Baby Kavya Awasthi, the grand daughter of the respondent No. 3 is living along with her grand parents after the demise of her father. The petitioner No. 2 who is the natural mother of the minor Baby Kavya Awasthi had left the matrimonial house out of her own accord leaving behind the corpus and since then Baby Kavya Awasthi, the petitioner No. 1 is living with her grand parents happily who have been taking full care of her nourishment and welfare. The respondent No. 3 who is the grand father of the petitioner No. 1 cannot be presumed to be an illegal guardian and Baby Kavya Awasthi cannot be averred to be in kept in illegal custody. The respondent No. 3 has lost his son on account of maltreatment meted out to him by the petitioner No. 2. Now the respondent No. 3 cannot be deprived of the custody of his grand daughter Baby Kavya Awasthi by filing the Habeas Corpus Petition.

7. The grand parents of Baby Kavya Awasthi can take better care of her welfare and goodness in whose guardianship, she is living. The petitioner No. 2 herself left the house of in-laws with valuables and cash and lodged the false report in

Manila Thana. She called her husband on the pretext of removing their differences and gave poison on 18.10.2012 as a result of which his son died in the hospital on 19.10.2012. In view of the facts and circumstances, the question with regard to the custody of minor child can very well be decided under the provisions of Hindu Minority and Guardianship Act.

8. Learned counsel for the petitioner No. 2 refuted the contention of the learned counsel for the respondent No. 3 contending that the petitioner No. 2 performed marriage with the son of the respondent No. 3 on 1.3.2009 according to Hindu Customs & Rites. Soon after the marriage the in-laws started to harass & torture the petitioner No. 2 for fetching additional dowry. She was facing the brunt and slapdash of her in-laws in a hope that they will change their psychology in near future when a baby child was borne out of their wedlock which made them annoyed all the more. On account of the maltreatment and atrocious act of the in-laws including her husband, the petitioner No. 2 was constrained to leave her matrimonial house along with her Baby Kavya Awasthi and since then the petitioner No. 1 was living in the custody of her mother who was taking full care and caution about her goodness and well being while residing with her parents. She has been deprived of the custody of minor daughter Baby Kavya Awasthi on 15.10.2012 when her in laws and husband visited her house and assaulted her brutally on account of non-fulfilment of demand of dowry of Rs. 1.00 Lac. The minor child Baby Kavya Awasthi was forcibly taken away by the in-laws extending threats that if she wants to take back her minor daughter Baby Kavya Awasthi, she will have to pay Rs. 1.00 lack otherwise she will be done to death by setting ablaze. The petitioner No. 2 got herself medically examined on 16.12.2012. The said incident was reported by the petitioner No. 2 to the D.I.G. Kanpur Nagar for taking appropriate action. The petitioner No. 2 went on ventilating her grievance from pillar to post for taking the custody of her minor daughter Baby Kavya Awasthi from her in-laws but all her efforts did not bring any positive result. The petitioner No. 2 moved an application before the concern Station House Officer Anwarganj Kanpur Nagar for the custody of her minor daughter Baby Kavya Awasthi. Subsequent thereto several applications were moved by the petitioner No. 2. before the concern police authorities but all efforts went in vain. Having lost hope of getting custody of her minor daughter Baby Kavya Awasthi, the petitioner No. 2 has knocked the door of this Court by means of instant Habeas Corpus Petition. The mother is the natural guardian of Baby Kavya Awasthi who can take full care of her betterment and welfare. It is also averred that her father in law has moved application u/s 156(3) Cr.P.C. before the Metropolitan Magistrate-II Kanpur Nagar on 5.1.2013 with false and frivolous allegations that on account of mutual bickering between the petitioner No. 2 and her husband, the respondent No. 3 has to loose his son who died on account of consuming poison but a report was submitted by the police station concern on the application moved by the respondent No. 3 u/s 156(3) Cr.P.C. that the husband of the petitioner No. 2 committed suicide and with an oblique motive of taking the custody of minor Baby Kavya Awasthi, the respondent No. 3

has moved the aforesaid application u/s 156(3) Cr.P.C. on false allegations. Thus the entire allegations attributed by the respondent No. 3 with respect to death of his son were found to be false by the police who submitted a report on 18.1.2012. There is sufficient material in support of the bona fide of the petitioner No. 2 that on account of the maltreatment meted out to her husband by the in-laws, he had taken drastic step to end his life by consuming poison, therefore, the petitioner No. 2 who is the natural guardian of minor Baby Kavya Awasthi cannot be deprived of taking care and well being of her minor daughter. The Habeas Corpus may be allowed with costs. Learned counsel for the petitioner No. 2 has relied upon a judgment of this Court in Tribhuwan Tiwari Vs. Shiv Kumar Tiwari and Another, . Para 13 of the said judgment is delineated hereunder :

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 "the time being". Therefore, even if the minor children are not being unlawfully detained, the present Habeas Corpus petition filed by their mother is maintainable.

9. The petitioner No. 2 if driven to have recourse to proceedings under the provisions of Guardian & Ward Act would not get such redress as to which she is presently entitled and also that the immediate welfare of the child requires this mother matter of custody to be decided in the Habeas Corpus Petition.

10. Having considered the rival submission advanced by learned counsel for the parties, it emerges that the corpus Baby Kavya Awasthi is aged about two years. Her natural mother has filed Habeas Corpus petition for the custody of her minor daughter Baby Kavya Awasthi from in-laws. The husband of the petitioner No. 2 has also died. The allegation and counter allegations have been made as regard to the ill-treatment meted out to each other. It is abundantly clear that both the parties have attributed allegations against each other when this Court talked to them but their strained relation is not relevant for the decision of this Habeas Corpus Petition as the interest of the minor daughter will be highly prejudiced. Reliance can be placed upon a decision of this Court in Smt. Imtiaz Bono v. Masood Ahmad Jafri and others, AIR 1979 All 25, where custody of minor infant was given to the natural mother after considering the objection raised qua maintainability of the Habeas Corpus and welfare of the child.

11. The preliminary objection of the learned counsel for the respondent No. 3 qua the maintainability of the Habeas Corpus Petition, the objection cannot prevail if proceedings under the Guardian & Wards Act is initiated by the mother for the custody of her minor daughter aged about two years, the proceedings and the appeal thereunder will take long time to finally decide the immediate

issue of custody. The said remedy under the Act cannot be said to be an adequate remedy nor can it be said to be an efficacious remedy. Hence the preliminary objection is rejected. The immediate welfare of the minor girl is of urgent concern of this Court in the particular circumstances of the case when her father is not alive. Her mother is an educated and earning lady, therefore the apprehension of the respondent No. 3 that she would not get proper care from her mother is unfounded. The natural mother can sacrifice anything and can cherish more love, affection and care in fact appears to have gone mad to have her custody for her welfare. It is not out of place to mention here that the mother is greater than earth and dearer than even the heaven. Her love and affection can not be compared in any manner whatsoever to that of any man or women.

12. In *Rajesh K. Gupta Vs. Ram Gopal Agarwala and Others*, , the Hon''ble Apex Court where the controversy about child custody between the father and mother of the child was set at rest by upholding the order of High Court in Habeas Corpus Petition permitting the custody of the child to remain with the mother and the appeal was dismissed.

13. Similar issue involved in *Syed Saleemuddin Vs. Dr. Rukhsana and Others*, , where custody of two minor children was ordered to remain with their mother dismissing the appeal filed by the husband.

14. In view of all these realties and in view of above mentioned facts and circumstances,, the respondent No. 3 is accordingly directed to hand over the custody of minor Baby Kavya Awasthi to the petitioner No. 2, the natural mother.

15. In the result this petition is allowed. However, it is provided that the petitioner No. 2 and the respondent No. 3 alongwith Baby Kavya Awasthi will be present before the Chief Judicial Magistrate concern on 25.3.2013 in whose presence the custody of the child will be given to her mother, the petitioner No. 2 putting appropriate conditions so as to protect the safety and interest of the minor daughter and her mother.

16. A copy of this order alongwith ml particular of parties be sent through FAX to the concern Chief Judicial Magistrate for compliance and necessary action forth with. The parties will bear with own costs.