

(1970) 11 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 471 of 1970

Budhulal Shankarlal

APPELLANT

Vs

An Infant-Child (not named) and Others

RESPONDENT

Date of Decision : 18-11-1970

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 491
Hindu Minority and Guardianship Act, 1956 — Section 6

Citation : AIR 1971 MP 235 : (1971) CriLJ 1566 : (1972) ILR (MP) 621 : (1971) JLJ 182 : (1971) MPLJ 32

Hon'ble Judges : Shiv Dayal Shrivastava, J; A.P. Sen, J

Bench : Division Bench

Advocate : Surendra Singh, for the Appellant; K.M. Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Dayal, J.

This is a petition u/s 491, Criminal Procedure Code, for release of an infant (not yet named) aged about three months from the custody of Kallu and Smt. Tarabai (respondents 2 and 3 respectively).

It is, alleged in the petition that the petitioner is the father of the child. The child was born on August 18, 1970. Almost immediately after the delivery, the child's mother (the petitioner's wife) died. As the petitioner had to perform the last rites of his wife, he handed over the custody of the child to Kallu and his wife, Tarabai, (hereinafter called the respondents) at the Lady Elgin Hospital for temporary care. These respondents are friends of the petitioner. There was an understanding between the petitioner and the respondents that the child would be restored to the petitioner as soon as the last rites were completed. It is then alleged in para 5 of the petition as follows:--

"That after finishing the last rites, the petitioner demanded back the custody of respondent No. 1. Respondent Nos. 2 and 3 refused to hand over the custody of

respondent No. 1 to the petitioner."

It is further alleged that the petitioner lodged a report in Ranjhi Police Station House on November 7, 1970. The petitioner is a Government employee and has sufficient means to bring up the child.

In the return filed by Kallu and his wife, it is admitted that the petitioner is the natural father of the boy. It is, however, alleged that when the petitioner's wife died on the labour table, the petitioner took the custody of the dead body but refused to take into his custody the boy from the Lady Doctor who was on duty in the hospital, saying that there was nobody to look after the child in his house. Since the respondents were present there and they are without any issue, they offered to take the child in their custody to bring it up as their own son. The Lady Doctor, with the consent of the petitioner, gave the child to the respondents. The petitioner had no money to perform the last rites of his wife. Kallu respondent paid him Rs. 100/- in the hospital for that purpose. The boy was only 3 pounds in weight at the time of his birth. The respondents have been taking the child to Lady Dr. A.K. Kamdin for his treatment and he is still under her treatment. They have filed a certificate given by Dr. Kamdin, which shows that she has been treating the child for 2 1/2 months. The respondents have spent a lot in the upbringing and treatment of the child. Dr. Kamdin's hospital is about 7 miles from their residence.

On November 4, 1970, the petitioner demanded Rs. 500/- from Kallu respondent, which could not be met by him. This caused displeasure to the petitioner. On the 6th November, the petitioner went to the house of the respondents on a motor bicycle, along with his friend. He asked Smt. Tarabai to get him a glass of water. When she went inside for that purpose, the petitioner and his friends lifted the child and ran away. The matter was reported to the Security Officer, Col. Inderdev, with whose intervention the custody of the child was restored to the respondents. It was after this incident that the petitioner lodged a report in the Police Station and filed this petition.

It is further stated in the return that the petitioner is not in a position to properly take care of the boy. The petitioner's marriage with his deceased wife was an outcome of love affairs and the inter-caste marriage estranged his parents. There is no female member in the petitioner's house who can look after the boy. The boy is of a very tender age and still requires treatment. It is further stated in the return that the respondents have developed great love and affection for the boy. The return is supported by an affidavit.

In compliance with the rule nisi the boy was produced by the respondents, who also personally appeared before us.

The petitioner has told us that he is an employee in the Gun Carriage Factory. When we asked him who would look after the child in his absence, he stated to us that his mother and sister were also residing in his house. This was immediately controverted by the learned counsel for the respondents. The

petitioner asked for an hour's time and brought his mother and unmarried sister of 17 years. When we asked the petitioner's mother where she resided and wherefrom she had come, she told us that she resides in a village which is away from Jabalpur and that she came from Ranjhi, where she was staying with her married daughter. She admitted that she had not come from the house of the petitioner; nor had the unmarried sister of the petitioner come from his house.

The petitioner voluntarily denied before us that he had lifted the child from the respondent's house as stated in the return. After a while, when we asked the petitioner's counsel to once more ascertain from him because we intended to call Col. Inderdev in the Court within an hour or so, the learned counsel for the petitioner took immediate instructions from the petitioner and told us that Col. Inderdev did intervene and the custody of the child was restored from the petitioner to the respondents as stated in the return.

Learned counsel for the petitioner strenuously contends that the petitioner being the father is the natural guardian of the infant according to the Hindu Minority and Guardianship Act, 1956. Reliance is placed on Gohar Begam Vs. Suggi alias Nazma Begam and Others, and it is urged that the respondents have no legal right whatever to the custody of the infant and that the refusal of the respondents to make over the infant to the petitioner amounts to illegal detention of the infant within the meaning of Section 491, Criminal Procedure Code. It is clear to us that the facts of that case were quite different and that decision is not apposite to the present case. In that pronouncement, their Lordships said in paragraph 9:--

"Before making the order the Court is certainly called upon to consider the welfare of the infant concerned."

Then their Lordships considered the peculiar facts of that case and pointed out three things. (1) The learned Judges of the High Court had not given any reason which led them to exercise their discretion in the way they did; (2) their Lordships found that the appellant, as the mother, was expected to take better care of the child than the respondent; and (3) their Lordships did not find a single reason how the interest of the child would be better served, if she was left in the custody of the respondent and not with the appellant. From the Supreme Court decision, it is abundantly clear that their Lordships have restated the law that whenever the question of custody of a child arises, irrespective of the proceedings in which it arises, the predominant consideration is the welfare of the child. If that was not so, all observations made by their Lordships in paragraphs 9, 10 and 11 would have been redundant. It is clear from that decision that the Supreme Court examined all the facts and circumstances of the case to find out whether there was a single reason for which the interest of the minor would be better served if she was left in the custody of the respondent and not with the appellant, but they did not find any.

The law is clearly this:-- (1) a writ of habeas corpus ad subjiciendum (you have

the body to submit or answer), shortly called as a writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. (2) However, the writ further extends its influence to restore the custody of a minor to his guardian, when wrongfully deprived of it. (3) The detention of a minor by a person who is not entitled to the legal custody is treated for the purpose of granting a writ as equivalent to imprisonment of the minor. (4) The power of this Court in granting a writ is qualified and has to be used in exercise of judicial and sound discretion. (5) An application u/s 491, Criminal Procedure Code cannot be thrown out merely on the ground that there is an alternative remedy under the Guardians and Wards Act available to the petitioner. (6) The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary, so that the latter will not be enforced by issuance of a writ when it is in conflict with the former consideration. (7) If that paramount consideration does not call for a writ to be issued it will be refused and the petitioner would be left to resort to the remedy provided under the ordinary law. (8) The guardian's claim to the custody of the child is not a right in the nature of property, but it is a right in the nature of trust for the benefit of the minor. This was also the view taken in *Bhagwati Bai Vs. Yadav Krishna Awadhiya and Others*,

The cardinal principle is that a minor cannot take care of itself so that the State as *pater patriae* has powers to do all acts and things necessary for his protection.

In the technical sense, it can be said in the present case that when the petitioner, as the natural guardian of the child, demanded its custody from the foster parents the respondents and they refused to hand over the child to the petitioner, their custody became unlawful from that moment. But, as stated above, it is the duty of this Court to have regard to the welfare of the child before we order the respondents to hand over the custody of the child to the petitioner.

Now, the following facts and circumstances are remarkable and peculiar in this case:-- (1) Right from the time of his birth, the boy has been in the care of the respondents. They have been bringing up the child all these three months, which is clear proof of the fact that the boy has all along received proper care and attention and necessary treatment from the foster parents. (2) The certificate of Lady Dr. Kamdin is also evidence of the expenses incurred by these respondents and the interest they have been taking in the treatment of the child by Dr. Kamdin. They have been taking the child 7 miles from their residence every now and then for the last 2 1/2 months. (3) We saw the child. It is now healthy for its age. (4) The respondents have naturally developed great affection for the child. This is not to say that the interest of the foster parents is of any consideration. What we say is that having regard to the respondents' affection for the boy, it will be in the interest of the boy that he continues to have their affectionate care and custody. (5) On the other hand, the petitioner is all alone in his quarter.

There is no female member residing with him. He is a workman in the Gun Carriage Factory, There will be no body to take care of the child when the petitioner is on duty every day. (6) When the above difficulty was pointed out to the petitioner, he requested us to keep the child in the custody of his mother. But, as already said, his mother ordinarily resides in a village. The petitioner then asked us to deliver the custody of the child to his married sister, but that married sister never came before us with such a request. Such offers, as the petitioner made before us, themselves go to show that his main purpose is not to bring up the child himself but to deprive the respondents of the custody.

The following facts are not without significance, (i) It is stated in the return that the petitioner's parents did not like the love marriage of the petitioner with his deceased wife. They would, therefore, have hardly any affection for the boy, who owes his birth to that lady. (ii) The respondents have asserted in the return that the petitioner demanded Rs. 500/- from them which creates a suspicion that the petitioner may be entertaining a thought of giving over the child to some other person, who is without an issue, for the sake of money. (iii) The petitioner's mother or the married sister or the unmarried sister not one of them made any request to us that she wanted to take the custody of the child and bring him up. (iv) The petitioner made two false statements before us: (a) that his mother and unmarried sister reside with him; and (b) that he did not lift the child from the respondent's house, as alleged by them in the return. The first was controverted by his mother herself. His counsel, after a while, told us that the second statement was false and that Col. Inderdev actually intervened.

It must be remembered that the scope of the present proceedings is very limited. It is not as if we have to choose between two rival claimants for the guardianship of the minor. That can be done in appropriate proceedings. The only purpose of the above conspectus is to see whether the infant should be taken away from the foster parents and delivered to the natural father. Here, it is not as if the respondents, by force or fraud, removed a minor from lawful guardianship. The initial entrustment of the infant's custody to the respondents was with the petitioner's consent.

In the situation as it obtains today, having regard to all the circumstances enumerated above and particularly the outstanding facts that the petitioner has to go to the factory for work and there is no grown up female to look after the infant, the infant preeminently requires the care and protection of the foster mother.

The petition is, therefore dismissed. There shall be no order for paper book costs.