
(1987) 04 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : Criminal Writ Petition No. 3 of 1987

Janak Kuamri

APPELLANT

Vs

R.C. Kotwal

RESPONDENT

Date of Decision : 14-04-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (1987) 16 ILR HP 198 : (1988) 1 RCR(Criminal) 672

Hon'ble Judges : P.D. Desai, C.J;R.S. Thakur, J

Bench : Division Bench

Advocate : Rakesh Kanwar, for the Appellant; O.P. Sharma, for the Respondent

Judgement

P.D. Desai, C.J.—This is a habeas corpus petition instituted by the mother of two minor girls, Monica and Ambika, aged 13 and 12 respectively, against the Respondent who obtained an ex parte decree of divorce against the Petitioner on July 6, 1978 and who has taken away the minor daughters with him to Mandi on March 14, 1987. Several disputed questions of fact are sought to be raised in the course of this proceeding but it is not necessary to determine all those disputes. We shall confine our attention only to those material aspects which have a bearing on the question of the right to the custody of the minor girls. The facts, which are not in dispute, or which are incapable of being disputed, are as follows:

- (1) The Respondent obtained an ex parte decree of divorce on the ground of mental cruelty on July 6, 1978,
- (2) He married one Puna alias Punam on January 13, 1985; prior thereto, vasectomy operation was performed on him on October 14, 1982.
- (3) He is employed in a transferable post and he is presently posted at Mandi. Prior thereto, from 1978 to 1985, he was posted in Shimla.
- (4) The two minor girls were being educated in the Port more School, Shimla, till March 14, 1987, when both the girls were taken away by the Respondent to

Mandi; they have not been admitted in any School at Mandi as yet.

(5) All throughout this period, that is, till March 14, 1987, the custody of the minor girls has remained with the Petitioner and even now a minor son aged about 10 years is still in her custody.

(6) On February 24, 1986, a consent order has been made in a proceeding u/s 125 of the Code of Criminal Procedure directing the Respondent to pay Rs. 800/- per month towards the maintenance of the Petitioner and the three minor children.

2. A few of the relevant facts in controversy between the parties may also be set-out. According to the Petitioner, the petition for divorce was filed while she and the Respondent were staying under the same roof and the proceedings resulted in an ex parte decree of divorce since she did not appear or cause an appearance to be made in view of the assurance held out by the Respondent that he was not inclined to pursue the divorce petition and that he would withdraw the same on the next day of hearing. The Respondent has denied that he held out any such assurance to the Petitioner. According to the Petitioner, she learnt about the divorce decree for the first time on April 17, 1985, where as according to the Respondent she knew about the same since 1978. According to the Petitioner, without disclosing the factum of divorce, the Respondent continued to live with her under the same roof at Shimla till April 3, 1985. The learned Counsel for the Respondent stated that till his remarriage on January 13, 1985, the Respondent lived in the same building in which the Petitioner was living but in a separate room adjacent to the premises of the Petitioner and that thereafter he hired separate premises at Totu, Shimla, where he was living with his second wife. According to the Respondent, the Petitioner herself had requested him to take the two minor daughters to Mandi and she had also made an application to the school authorities in Shimla to issue their school leaving certificates. The Petitioner has denied this allegation and averred that the so-called applications for the issue of the school leaving certificates are forged. The Petitioner has alleged that the Respondent had also taken away the school leaving certificate of the third child, a minor son aged about 10, with the intent of taking him away to Mandi. This fact is not in dispute although the parties are at variance as to the circumstances under which the Respondent obtained the school leaving certificate. According to the Petitioner the said act on the part of the Respondent was against her wishes where as, according to the Respondent, it was a step taken in furtherance of an agreement between him and the Petitioner. According to the Respondent, the custody, of the minor girls with him is neither illegal nor against their wish and he is more suited than the Petitioner to retain the custody and it is for the ultimate welfare of the minor girls to allow him to retain the custody. The Petitioner has controverted this assertion and laid a claim to the custody of the girls on the ground that she being their mother and they having lived with her for all these years, the welfare of the minors would be better served by restoring their custody to her. The Petitioner has alleged that she was

deprived of the custody of the minor girls by resorting to force and the girls were taken to Mandi against their wish. The case of the Respondent, on the other hand, as earlier pointed out, is that no force was used and that he took his minor daughters to Mandi with the consent of the Petitioner. In the return filed by the Respondent, there is an allegation that the Petitioner is a "lady of easy virtue"; this is merely a vague allegation and is not supported by any evidence nor are any particulars furnished which could justify such an inference being raised against her. The Petitioner has stoutly controverted such allegations.

3. The question which arises against the aforesaid background is whether in the exercise of its writ jurisdiction, the Court should order that the custody of the minor girls be restored to the Petitioner.

4. The law on the subject has been discussed in great detail in Criminal Writ Petition No. 16 of 1986 *Kamla Devi v. State of Himachal Pradesh and Ors.* decided on July 24, 1986 (I.L.R. 1986 HP 485). The writ of habeas corpus can legitimately issue in child custody cases. The Court, while deciding the conflicting claims and awarding custody in the said jurisdiction, exercises inherent jurisdiction which is independent of and which is not fettered by any particular provision in any special statute, though those provisions may be looked into. The power which the Court exercises in such proceedings is the equitable power of the State as *parens patriae*, for the protection of the infant ward and the jurisdiction which is exercised is that of the Court of equity. The Court determines in such a proceeding as to which out of the two parents must have the custody bearing in mind as to who in the Court's view would be best suited due regard being had to the interests and welfare of the child. The Court, in issuing the writ, is not bound by the mere legal right of a parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. The Court will take into consideration the circumstances such as child's ordinary comfort, contentment, intellectual, moral and physical development, health, education and general maintenance and the favourable surroundings. The custody may be withheld from a parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. If the child be of an age to exercise his/her choice, judgment and discretion, his/her wishes may be ascertained and taken into consideration in deciding with whom he/she should reside. The employment of the remedy of habeas corpus in a child custody case does not depend upon the illegality of confinement or restraint as contemplated by the ancient common law writ, or by statute. The primary purpose of the proceeding is to furnish a means by which the Court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child and the decision is reached solely on the consideration of the welfare of the child against which the legal rights of no one, including any parent, are allowed to militate. The Court may not take into consideration whether from any other point of view the father's claim in respect of the custody or upbringing is superior to that of the

mother, or the mother's claim is superior to that of the father. The ultimate determination, "against the background of all the relevant facts and circumstances, must depend on the welfare of the child as a human being so that he may grow up in a normal balanced manner to be a useful member of the society.

5. In the present case, in our opinion, the interests and the welfare of both the minors require that their custody be awarded to the Petitioner. The minors are girls aged about 13 and 12. They are at a stage of life when for the next few years it would be in their interest to live with their mother who will be able to provide them the necessary care and guidance as well as the emotional security. They have all throughout remained with the Petitioner who has brought them up and looked after them. Their minor brother is also with the Petitioner and it will be beneficial for all the three children to live and to be brought up together in congenial and familiar surroundings as members of the same family. The niece of the Petitioner, aged about 16, is living with her and she would also be in a position to help the Petitioner in looking after both the minor girls and give them company. Both the minor girls have received their education so far in Shimla and they are accustomed to the climatic conditions as well as to the surroundings of Shimla. There is nothing against the Petitioner which might disqualify her from claiming the custody. The Respondent has remarried and lives with his second wife at Mandi. No other relative of their lives with them. The Petitioner and he have fallen out completely. The award of custody to him would result in both the girls living with the step-mother when the natural mother is still alive and is ready and willing to keep them in her custody. The Respondent is holding a transferable post and may have to move from station to station in the course of his career whereas the Petitioner is living in Shimla and is not likely to go away from the station. We have also ascertained the wishes of both the girls in Chamber. We found that the elder amongst the two is quite intelligent. She answered the questions put to her by us after proper appreciation of their import. Both the girls unhesitatingly told us that they would like to live with the mother. They also stated that they were not happy with the father during the brief period that they stayed with him at Mandi.

6. Having regard to all the circumstances of the case, in our opinion, this is a fit and proper case in which the custody of both the minor girls be directed to be awarded to the Petitioner. We would like to make it clear, however, that the present order is of a temporary nature and that it is open to review according to the circumstances that may arise in future and that in such circumstances the parties will be at liberty to apply to the Court for an appropriate relief. We would like to observe also that the learned Counsel for the Petitioner has assured the Court that she will not take up any gainful employment which requires her being away from home during the time the minor girls are at home. The Petitioner will file an undertaking on affidavit to that effect in the Registry of this Court within 48 hours. The Petitioner will also ensure that both the minor girls once again join the school in which they were prosecuting studies. We are also of the view that

the best interests of the minor girls require that they should not be altogether deprived of the father's company and, therefore, direct that the Respondent will be provided access to the minor children by the Petitioner at her house in Shimla on the alternate Sundays every month between 1.00 and 4.00 P.M. The Respondent will not, however, take the children out and will not by any act or omission on his part create any situation which has the direct or indirect effect of disturbing the sense of security and emotional balance of the children and the domestic harmony.

7. It is an admitted fact that the Respondent has obtained the school leaving certificate of the minor son who is in the custody of the Petitioner and about whose custody there is no dispute in the present petition. The Petitioner has prayed that the Respondent be directed to deliver the school leaving certificate back to her so that an eventuality may not arise whereby the studies of the minor child are disturbed. The request is reasonable. Accordingly, the Respondent is directed to deliver the school leaving certificate to the Petitioner on or before April 17, 1987.

8. Rule is made absolute in the aforesaid terms. The Respondent will pay to the Petitioner the costs of this petition which are quantified at Rs. 350/-. The payment will be made within a period of fifteen days from today.