
(1989) 01 MP CK 0031
In the Madhya Pradesh High Court
Case No : M.P. No. 959 of 1988

Manju Tiwari

APPELLANT

Vs

Rajendra Tiwari and Others

RESPONDENT

Date of Decision : 30-01-1989

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 6

Citation : (1990) 35 MPLJ 562 : (1990) MPLJ 562 : (1991) 1 RCR(Criminal) 492

Hon'ble Judges : T.N. Singh, J;K.K. Verma, J

Bench : Division Bench

Advocate : A.M. Naik, for the Appellant; P.L. Dubey and R.A. Roman, for the Respondent

Final Decision : Allowed

Judgement

T.N. Singh, J.

The child Kartik alias Appu was born on 11-11-1986 at Hathras, to the petitioner, who has claimed his custody in this habeas corpus petition, filed on 8-8-1988. The first respondent Dr. Rajendra Tiwari is the father who had produced the child in this Court on 6-9-1988 pursuant to the specific direction made in that regard by this Court on 23-8-1988. The matter could not, however, be disposed of even on 21-9-1988 when the return and the rejoinder thereto came on records. The delay that has occurred is mainly due to the direction that was considered necessary to be made on 21-9-1988 because the husband/father contested seriously the mental fitness of the wife/mother to be entrusted with the child's custody.

Before we advert to the averments made in the petition, return and the rejoinder, we may observe even at this stage that talks were held in camera on 21-9-1988 with the husband and the wife to explore possibilities of a reconciliation between the two, so that the mother could come from Hathras and live with the father and the child at Gwalior. This Court had then taken the view

that enquiry of the nature ordered in Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, was not warranted in the facts and circumstances of the case, but it was still considered necessary to set at; rest all doubts raised by the respondent/father about mother's mental unfitness, by making a direction that she be examined by the Head in the Department of Psychiatry of All India Institute of Medical Sciences at New Delhi. That Report dated 3-11-1988 came to the Court only on 30-11-1988 and on 14-12-1988, objections to the report filed by respondent No. 1 also came on records along with petitioner's reply to those objections. When hearing of the matter was taken up by us on 16-1-1989, "Additional Objections" filed on behalf of respondent No. 1 also came on records and at our request, Shri M. C. Jain, Deputy Advocate-General, also filed copies of correspondence passed between him and Dr. D. Mohan, Head of the Department of Psychiatry at the All India Institute at Delhi. After counsel addressed us on relevant contentions of law and facts, we reserved orders.

It is established on facts that the petitioner had done her M. A. in Sociology in the year 1978 and she was married on 16-11-1984 to respondent No. 1. It is alleged in the petition that her brother Mr. D. K. Saraswat and her mother gave about Rs. 40,000 in cash besides gold ornaments and such articles as a Bajaj Super Scooter, a television set and a refrigerator to make a dowry at a total cost of Rs. 80,000/-. However, her husband did not give her fair treatment and pressed for an additional dowry of Rs. 50,000/-. It is also alleged that he was in the habit of consuming liquor and in support of that allegation, an affidavit sworn on 17-9-1988 by one Satish Chandra Sharma of Naya Bazar, Lashkar, Gwalior, has been brought on record. The petitioner is alleged to have suffered physical and mental torture at the hands of her husband and the other members of his family for a long time, hoping for a change and for the demand of additional dowry to subside in due course. It is also alleged that in the month of July, 1985, the petitioner was pushed down by her husband from the second storey of the house when she was in advanced stage of pregnancy. She miscarried and also suffered fracture of hip bone and leg.

Sometime later, her brother took her to Hathras, but she came back to Gwalior in May, 1987 and brought with her 6/7 months' old child whom she had given birth, as earlier alluded, on 11-11-1986 at Hathras. It is further alleged that her ill-treatment continued unabated despite the birth of a male child and that she somehow managed to send information in that regard to her brother through one Hari Sharan Sharma whose letter dated 24-6-1987 has come on record as a part of the petition (Annexure A/2). Her brother came to Gwalior, but was not allowed to meet the petitioner or her son and the demand for additional dowry was pressed. He then went back and submitted on 30-6-1987 an application in the Hathras Court, as per Annexure A/3, for a search warrant in respect of the petitioner and her son; but on 4-7-1987, it is alleged, the petitioner was driven out by the respondent of the matrimonial house, keeping with him the suckling baby Appu as also the dowry amount. When the petitioner came back to her brother at Hathras, in the pending proceedings, prayer was modified and

accordingly, search warrant was issued on 5-7-1987 in respect of the child Appu only. It is further alleged that on 9-7-1987, petitioner's brother himself accompanied the Police Officer to Gwalior to serve the search warrant (Annexure A/4), but the child was hidden away and the warrant could not be executed. On 14-7-1988, the father of respondent No. 1 died and relatives who gathered on the occasion, assured petitioner's brother that the child will be restored to her and requested him not to follow up the pending proceedings u/s 97, Criminal Procedure Code in the Hathras Court; but the assurance has failed.

In his return, the respondent denied receiving any dowry at all and he also denied having made any demand for additional dowry or having taken liquor at any time or giving physical or mental torture to the petitioner. At para 4 of the return, it is stated that from the date of the marriage, "the petitioner was continuously staying with him upto August, 1985" and thereafter, her mother took her away to Hathras as the petitioner was expecting a child. She came back 6 or 7 months after the delivery and continued to stay with the respondent along with the newly born son Kartik alias Appu. As to the allegation of fracture of hip bone and leg sustained by the petitioner, it is stated that "she slipped while coming from bath-room" and she did not sustain injury in the manner complained. In para 7, it is stated that from prior to the marriage, the petitioner was "suffering from the disease of PSYCHOTIC DEPRESSION" and she was being regularly treated for the ailment as an OPD patient in the Mental Hospital at Gwalior and even at Agra. It is stated that for that illness, she was unable to maintain the newly born child and his mother had to look after the child. It is also stated that the petitioner herself left the six month old child and went away to the house of her brother and mother at Hathras. In support of the allegation about petitioner's illness, Annexures R/I and R/II are submitted with the return. The first one is an "Outdoor Ticket", dated 6-6-1987, bearing endorsement thereon in respect of medicines prescribed on 6-6-1987 and 1-7-1987. The other document is said to be a letter written from Hathras on 29-11-1986 by the petitioner to one L. R. Sharma of Lashkar, Gwalior. Therein, there is a mention of the writer having got herself examined by the Mental Specialist, Dr. R. K. Jain, at Agra, who is said to have told her that her mental nerves had weakened and had prescribed her medicines which she was taking. True, in her rejoinder dated 17-9-1988, supported by an affidavit, the petitioner has not disputed the authenticity of the letter, Annexure R/II. She has still filed two medical certificates establishing that she suffered no mental illness. One of the certificates is by Dr. Sheelendra Chauhan of Gwalior, dated 13-9-1988, while the other is said to be by petitioner's family physician Dr. Vishwariath Sharma of Hathras which is dated 8-9-1988. In the last mentioned one, (Annexure P/9) Dr. Sharma has stated that as petitioner's family physician for the last 8/10 years, he never found her having any mental problem. In the rejoinder, she has also averred that she never suffered from the alleged disease of "PSYCHOTIC DEPRESSION" and has never been treated anywhere for that. As to Annexure R/I, she has stated that due to daily physical and mental torture, she suffered

partial loss of sleep and loss of appetite and she was, therefore, persuaded by her husband to accompany him to the Out Patients Department of the Mental Hospital at Gwalior. In the Outdoor Ticket (Annexure R/I), she was not prescribed any medicine for any mental illness as what was prescribed to her was Tab. Surmontil, Tab. Digne and Cap. Livogin. She has also given particulars of her treatment in Kamla Raja Hospital at Gwalior between 1-8-1985 and 4-9-1985 for miscarriage and for fracture of hip bone and leg.

On 21-9-1988, this Court made a direction for an Expert's opinion being obtained from the All India Institute of Medical Sciences, New Delhi, from the Head of the Department of Psychiatry, on the mental fitness of the petitioner with particular reference to the question as to whether it would be safe to entrust custody of a child, aged about three years, to her for his upbringing. It was also observed that when the examination is made, it shall be open to husband/respondent to be present on the occasion and Shri M. C. Jain, Deputy Advocate-General, was requested to act as a liaison between the parties and the Expert, nominated by the Court. For all expenses being borne in connection with the medical examination, the husband was held responsible and the report was expected within three weeks. The Court's order was duly communicated by the Registry to the Institute at New Delhi and Shri Jain also made correspondence with the Expert. In his report, dated 3-11-1988, Dr. D. Mohan, Professor of Psychiatry and Head of the Department, has stated that the petitioner was kept for observation in the Psychiatry Ward from 11-10-1988 till 31-10-1988 and he opined that he had not found her "to be suffering from any Psychiatric illness at present which may impair her capacity to look after her child in any way". We also propose to extract below in extenso the "Summary of Observation and Examination", attached to his report:

"Mrs. Manju Tiwari was admitted in Psychiatry Ward of A.I.I.M.S. from 11-10-1988 till 31-10-1988. The patient was examined, evaluated and observed daily during her in patient stay. The accounts of her problem were obtained from the patient herself and her brother Shri Dinesh Kumar Saraswat.

The information obtained from them consists mainly of details of her alleged harassment by her husband and in-laws. History of the patient shows no evidence of sustained sadness, ideas of hopelessness, worthlessness or suicide. No history of perceptual disturbances, disorientation, confusion or Schiniederian first rank symptoms could be elicited.

Her physical and detailed mental status examination did not reveal any abnormalities.

She also underwent a psychometric evaluation which did not reveal any psychopathology.

Her daily observation in the ward did not reveal any abnormalities."

Learned counsel for the husband/respondent has seriously challenged the report

mainly on two grounds. It is submitted by Shri Dubey that the report being in contravention of this Court's directions made in the order dated 21-9-1988, the same should be treated as void. It is also contended, relying on certain passages from medical text books, that the report is hopeless and is not acceptable on merits. In regard to the first contention, our attention is drawn to husband's application dated 28-10-1988 and reply thereto by the petitioner. In that connection, we have also perused the correspondence of Shri M. C. Jain with the Expert. In her "reply", the petitioner has submitted that on Shri Jain's bringing to petitioner's counsel's notice on 26-9-1988 the letter written by him to the Institute, the petitioner proceeded to Delhi with her brother on 8-10-1988 and there she met the Head of Psychiatry Department at the Institute. That fact is borne out by O.P.D. record of the Institute, Annexure A/11, which also discloses that the petitioner was eventually admitted at A.I.I.M.S. Hospital on 11-10-1988. As per Discharge Slip, Annexure A/12, she remained there from 11-10-1988 to 1-11-1988. As per the telegram which Shri Jain received from Dr. Mohan, it is stated, "MANJU TIWARI'S OBSERVATION PERIOD EXTENDED TO THIRTY FIRST OCTOBER". That telegram appears to have been received by Shri Jain on 26-10-1988. In her "reply" which is supported by her own affidavit as also of her brother's affidavit (sworn on 3-11-1988), she had further stated that her husband had gone to the Institute on 16-10-1988, 20-10-1988 and lastly on 27-10-1988. She has also stated that the husband came to the General Ward of Psychiatry Department of the Institute and he had been watching the petitioner. He had met the Registrar and other junior Doctors, but he failed to pressurise them.

7-A. Although on 2-11-1988, the husband has sworn an affidavit submitting another application to reiterate the averments made in the earlier application dated 28-10-1988, we find it difficult to accept his statement that only on 29-10-1988, and not before that, he went to Delhi and tried to meet Dr. Mohan. In his two applications, the husband has maintained complete silence as to what he did between 21-9-1988 and 26-10-1988, as regards this Court's order in so far as he was concerned. It is difficult to accept his further version that only on 26-10-1988 after Shri Jain had received the telegram, he came to know about the petitioner being admitted in A.I.I.M.S. Hospital at Delhi as it was within his knowledge that as per this Court's order dated 21-9-1988, the Expert's report was expected within three weeks and parties were not debarred to take necessary action from approaching the authorities of the Institute for that purpose after this Court's order had been communicated by the Registry as also by Shri Jain, to the Expert, nominated by this Court. If the petitioner went herself to Delhi without any date for her examination being fixed and communicated to the Registry or to Shri Jain, it cannot be said that by that, she had violated or circumvented this Court's order or that she had designedly done so to keep out the respondent/husband. In this Court's order, it was made clear that it was for the respondent to take necessary steps if he wanted to be present at the time of petitioner's examination and no direction was made that the

Expert shall not make the examination in respondent's absence. Indeed, to the statement made on oath on 3-11-1988 by petitioner and her elder brother, the respondent has not filed any counter-affidavit to contest the fact that he had not gone to the A.I.I.M.S. Hospital on the dates alleged, namely, on 16-10-1988, 20-10-1988 and 27-10-1988.

7-B. The respondent has indeed not satisfied us as to what steps he had taken to expedite petitioner's medical examination as he has not even averred anywhere that he had, at any time, offered either to Shri Jain or to the petitioner expenses for her medical examination as ordered" by this Court. From Dr. Mohan's letter dated 10-10-1988, addressed to Shri Jain and mailed under registered cover, it appears that Dr. Mohan took necessary steps to keep Shri Jain posted with the developments as in that letter he stated that the petitioner would be admitted on 11-10-1988 for observation. The fact that the letter was received by Shri Jain on 26-10-1988 would not detract a bit from what appears in that letter despite the letter dated 28-10-1988 addressed by the respondent to Shri Jain. We find it difficult to accept the statement made by the respondent in his said letter that respondent had no knowledge about petitioner's admission in the A.I.L.M.S. Hospital. True, acting on his letter, Shri Jain wrote on the same date a letter to Dr. Mohan, but as per Dr. Mohan's letter dated 24-10-1988 to Shri Jain, received by him on 31-10-1988, it was clarified that petitioner's observation was extended till 31-10-1988 and accordingly, she was discharged on the said date. Evidently there was no scope for Dr. Mohan to act on Shri Jain's letter dated 28-10-1988. However, on 21-11-1988, Dr. Mohan replied to Shri Jain that "Mr. Rajendra Tiwari did not come nor any request was received from him regarding his presence" during the petitioner's observation between 11-10-1988 and 31-10-1988.

We proceed now to deal with Shri Dubey's second contentention and in that regard, we would like to point out at the outset the glaring fact suggesting hollowness of respondent's claim that the petitioner is mentally sick. Nothing except Annexure R/I has come on record in support of the claim made by the respondent and even that Outdoor Ticket of the Mental Hospital at Gwalior, establishes nothing in respondent's favour. In her rejoinder, the petitioner has adverted to the circumstances under which she had to go to the Mental Hospital and she has also spoken about the medicines prescribed on the ailments complained by her. It is indeed surprising that if the petitioner was suffering the disease of "PSYCHOTIC DEPRESSION", that could not have been known to the respondent in November, 1984 when he had married her or immediately thereafter. But, there is no iota of evidence to suggest that she was ever examined earlier anywhere for that disease or given treatment for that. The respondent was a medical man, and according to us, he must have taken steps earlier if the fact, now alleged, was true. On the other hand, it appears to us that the respondent started designing circumstances to evolve the theory of petitioner's mental illness in June, 1987 with the ulterior motive of throwing out the petitioner from the matrimonial home, a month later keeping with him the

male child, even if we do not believe that any dowry was given and kept or any additional dowry was demanded. We regret today that petitioner's counsel was not careful to bring to our notice this design disclosed by records when an order was passed in this matter on 21-9-1988 for Expert opinion to be obtained from A.I.I.M.S., New Delhi on petitioner's alleged mental sickness. In so far as this Court is concerned, it was necessary to ensure that custody of the minor child was entrusted to proper hands for the welfare of the child and care had to be taken to ensure that the child was not given in the custody of a mentally sick person.

8-A. Whatever that may be, we are also not satisfied otherwise that the Expert opinion of Dr. Mohan is tainted or it is otherwise unsound. Reliance on passages from pages 420, 421, 423 and 424 of the Book "Physical Diagnosis", described as a Textbook of Symptoms and Physical Signs, authored by Rustom Jal Vakil and Aspi F. Golwalla, would not avail in any manner to respondent's benefit. The passages are cited in support of the complaint that without taking the case history from the respondent/husband, no dependable examination could be made. At page 418, it is stated - "Any information received from the patient himself must therefore be confirmed or supported by some near relative or friend who is reasonably objective in his thinking and genuinely interested in the welfare of the patient. No psychiatric history can be considered adequate or reliable unless this is done". But, we do not think if respondent could be regarded, in the facts and circumstances of the case, a "friend" who could be reasonably objective in his thinking" or even "genuinely interested in the welfare of the patient". We have already expressed our doubts about genuineness of respondent's claim and as such, he could not be expected to give unbiased information or case history. However, we also must note what appears at pages 419 and 420 of the said Book because what learned authors have observed therein takes wind out of the sail of the arguments advanced by Shri Dubey. As to the "diagnostic interview", it is said at pages 419 and 420 that there can be no rigid rule or "pattern" of interview applicable to all patients and it is also said at another place that "It is always best to let the patient have his own say first, and then, whatever information that appears lacking is collected through conversational channels.....". At another place, it is stated, "A psychiatric history, like any other medical history, should start with a presentation of the "chief complaint" or "problem", by the patient and his relatives.....," and that "it is important to inquire about the treatment carried out upto date". In this context, it is necessary to stress the view earlier expressed by us, that the respondent not having made out any case before us in this Court that any other treatment was given to the petitioner except that projected in Annexure R/I, no useful purpose would have been served even if he" was allowed to give any case history.

It is not necessary to refer to the other passages of the same Book, but we may still note that even the passages referred in the Book "Concepts of Depression" by Joseph Mendels, do not also advance respondent's case. In Chapter II of the

Book, under the caption "Symptoms of Depression", it is stated that those are "sadness, pessimism and self-dislike, along with a loss of energy, motivation and a concentration". It is also stated further that "the extent to which these symptoms are present and their combinations are infinitely variable; other symptoms are frequent and sometimes dominate the clinical picture". Although there is reference in the same Chapter to incidence of "Suicidal Behaviour" in that Book, there is no material placed before us speaking of any symptoms of the disease of "PSYCHOTIC DEPRESSION" which the petitioner is said to suffer. On vague allegations and that too made by a medical man like the respondent, it is difficult to give any credence to his claim that the petitioner suffers "Psychotic depression". If we have to say anything further in this connection, we may refer to a recent decision of the Apex Court, *Ram Narain Gupta Vs. Rameshwari Gupta*, , though that was a case of divorce, claimed on ground of mental disorder. It was held by their Lordships that mere branding of spouse as schizophrenic is not sufficient and degree of mental disorder must be proved. The ratio of that decision applies *mutatis mutandis* to the facts of the instant case though, in this case the question that arises for consideration is, whether custody of the child has to be denied to the mother, his natural guardian, on the ground of her mental disorder. As per section 6 of the Hindu Minority and Guardianship Act, 1956, custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Indeed, only under extraordinary circumstances mother has to be denied custody of her child though the father, and after him, the mother, are natural guardians of a minor's person as well as his property.

However, it is now well-settled that in determining custody of a minor, the paramount consideration that must weigh with the Court is his welfare, irrespective of the provisions of the Personal Law applicable to him and, therefore, we regard apposite reliance of Shri Naik, petitioner's counsel on this Court's decision in the case of *Mumtaz Begum Vs. Mubarak Hussain*, . In that case, for the welfare of a child of four years, in dire need of motherly affection and love, custody of the child was given to the mother. For the view taken, reliance was placed on clauses (e) and (f) of Article 39 of the Constitution as also on Principle 6 of the Declaration of The Rights of The Child, 1959, adopted by the United Nations" General Assembly. The universal principle is that - "child of tender age shall not, save in exceptional circumstances, be separated from his mother...". May we also recall in this connection the universal truth of which the English Poet Coleridge has said - "A mother is a mother still, the holiest thing alive".

10-A. Although Shri Dubey relied on *Vegesina Venkata Narasaiah Vs. Chintalapati Peddi Raju*, to stress distinction between custody of male and female child to advance father's claim, the facts of that case were entirely different. There the Court was considering the claim of father not against that of mother, but against his maternal grandmother, the mother being dead. On the other hand, their Lordships of the Apex Court in *Smt. Mohini Vs. Virender Kumar*, , declared

mother entitled to guardianship and custody of a male child of 11 years in preference to the father. In the circumstances of the case, it was found that the minor's welfare and "financially and affectionately safe in the hands of the appellant, mother". A Division Bench of Delhi High Court in Chander Prabha Vs. Prem Nath Kapur, , took the view that a child under five years of age needs more tender affection, the caressing hand and the company of his natural mother and that neither the father nor his female relations, however close, well-meaning and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's natural mother.

In the instant case, what has come on record is that the petitioner is an educated lady hailing from a respectable family of substantial means. It is on records that her brother is an Advocate and that petitioner's father had left sufficient property which can be shared by the petitioner with the brother. Indeed, even if she is self-employed, she will have no difficulty in bringing up the child and possessing the qualifications she has earned, it may not be difficult at all for her to get a job. As the child is about three years" old and the petitioner has no other child, it is but natural that she is bound to bestow on the child her full attention, love and affection. Indeed, there is nothing on record before us, except the vague allegations of petitioner's mental illness, which we have rejected, to suggest that the petitioner is unfit in any manner to be entrusted with the custody of her own minor child. On the other hand, what has come on records is also that respondent/husband hopes that the child will be continued to be looked after by his mother. He has lost his father recently and his mother is said to be 75 years" old and a heart patient at that. Even if the respondent is living with his other brothers in a joint family, his other relations are not expected to spare time and attention for the minor child, like the petitioner, who would have nothing else to think or do except looking after her only child and his welfare.

In the circumstances aforesaid, giving our anxious consideration to several contentions of fact and law above referred, we have reached the conclusion that proper person to have the custody of the child Kartik alias Appu is his mother, the petitioner. The custody of the child must, therefore, be restored to her immediately as the welfare of the child shall not be served by allowing him to stay with his father. We accordingly direct that the respondent/father, Dr. Rajendra Tiwari shall produce the child Kartik alias Appu before the Additional Registrar of this Court on 6th February, 1989 at 11.00 a.m. He shall hand over custody of the child to the petitioner/mother, Smt. Manju Tiwari. Necessary steps shall be taken by him to notify counsel and parties in that regard.

In the result, the petition succeeds and is allowed, but there shall be no order as to costs.