
(2006) 10 DEL CK 0187
In the Delhi High Court
Case No : Writ Petition (Cri.) No. 207 of 2006

Noor Mohd.

APPELLANT

Vs

State (NCT of Delhi) and Others

RESPONDENT

Date of Decision : 06-10-2006

Acts Referred:

Constitution of India, 1950 — Article 4, 5, 6
Penal Code, 1860 (IPC) — Section 364A

Citation : (2006) 92 DRJ 42

Hon'ble Judges : Manmohan Sarin, J; Manju Goel, J

Bench : Division Bench

Advocate : M.T. Malik and A. Waseem, for the Appellant; Mukta Gupta and Rajdipa Behura for Respondent Nos. 1 to 3, Shivanand and Vivek Bhaduria for Respondent Nos. 4 to 6 and Bankim K. Kulshreshtha, for Respondents No. 7, for the Respondent

Judgement

Manmohan Sarin, J.—Petitioner Noor Mohd. seeks a writ of habeas corpus for production of Farooque, a child, who was being reared by him. Farooque had been taken away from his custody by respondent No. 7 Saeeduddin, accompanied by the Police on 22-11-2005. Petitioner prays for action against the erring Police Officers as well as respondent No. 7 Saeeduddin, who claiming to be the biological father of Farooque. took away the child with the help of Police. Petitioner called the child "Farooque" while respondent No. 7 called him "Sonu". We have, for the facility of reference, referred to the child as "Farooque @ Sonu".

2. Petitioner claims that Farooque @ Sonu was being reared by one Kalu. An old woman had found him loitering in the village in the year 1999 and she had handed him over to Kalu. Petitioner alleged that as Kalu was not treating Farooque @ Sonu well, villagers and Police rescued Farooque @ Sonu from Kalu and left him in the care of the petitioner. Petitioner claims that he and his wife, who have six daughters but no son, showered all their affection on him and brought him up as their own child. Petitioner stated that he got Farooque @ Sonu admitted to the MCD school at Jasola. He produced a certificate showing

admission of Farooque @ Sonu to the School on 8-7-1999.

3. Respondent No. 7 is the complainant on whose complaint FIR bearing No. 7/2000 u/s 364-A IPC. PS Budhana, U. P. had been registered. Petitioner lodged the FIR stating that his son, who had been playing, went missing on 6-1-2000 and had been kidnapped. Respondent No. 7 claims that Farooque @ Sonu is the child born to him and his wife Hazra, who had been kidnapped. Respondent No. 7 along with the Investigating Officer of the case, had gone to petitioner's house and recovered the child. Respondent No. 7 Saeeduddin identified Farooque @ Sonu as his child and got his custody with Police help.

4. Petitioner before us claims that he is not the biological father of the child and had only been looking after and rearing him as his own son. According to petitioner, Saeeduddin is also not the biological father and Farooque @ Sonu is not his child. Petitioner claims that while as per respondent No. 7 Farooque @ Sonu had gone missing and was kidnapped on 6-1-2000, Farooque @ Sonu had been admitted to the Municipal School by him in July, 1999 and had been in his custody till 22-11-2005. In other words, Farooque @ Sonu according to him, could not be the missing or kidnapped child of respondent No. 7 as he was kidnapped as per the respondent on 6-1-2000 while Farooque @ Sonu had been admitted to the School by him in July, 1999.

5. We may also note that Kalu in his statement recorded before the Court on 24-5-2006, supported the version of the petitioner of Farooque @ Sonu having been initially kept by him and then having been handed over by the villagers and Police to the petitioner for being brought up.

6. Mr. Kulshreshtha, learned Counsel for respondent No. 7 submitted that no reliance should be placed on the School Leaving Certificate since the father's name of the child is given as Noor Mohd., S/o Nooruddin, while the present petitioner's name is Noor Mohd., S/o Mehruddin. Counsel for the petitioner says this, at best, could be a clerical error as the petitioner was illiterate. Mr. Kulshreshtha, while opposing the petition for habeas corpus, submits that there is no question of illegal confinement of the child as the petitioner himself has no legal right. It is also urged by him that a charge sheet has been filed before the Fast Track Court in the kidnapping case u/s 364-A IPC and the role of the petitioner and one Kalu, a driver (other than the Kalu, who is supposed to have handed over the child), is under investigation.

7. During the proceedings in the habeas corpus petition, learned Counsel for the State Ms. Mukta Gupta had urged that to put an end to doubt or suspicion, which is arising in the matter regarding the identity of the child, it would be appropriate to have a DNA test done to establish the parentage of the child. Mr. Kulshreshtha, learned Counsel for respondent No. 7 Saeeduddin, who was present in Court, upon obtaining instructions from him and his wife, stated that both of them along with the child, are willing to go through the DNA test to put an end to the controversy or doubt sought to be raised by the petitioner.

8. With the consent of the parties, directions were issued for carrying out the DNA test at the FSL facility at Rohini, Delhi. Respondent No. 7 along with his wife and child Farooque @ Sonu, were directed to report to the SHO of the Police Station together with the necessary identification papers. Petitioner was also directed to be present so that the child could be identified. The Sub Inspector, who had recovered the child from the petitioner, was also directed to be present to identify the child. Blood samples In pursuance of the directions given, were duly taken and the DNA test carried out. As per the DNA report, respondent No. 7 Saeeduddin and Hazra have not been found to be the biological parents of Farooque @ Sonu. The result as per the report and conclusion reached are reproduced for facility of reference:

RESULTS OF EXAMINATION

The DNA fingerprint profile of the source of Exhibits "2" & "3" i.e. (Sh. Saeeduddin and Smt. Hazira) are not matching with the Exhibit T i.e. (Master Farooqu @ Sonu). The maternal and paternal alleles are not accounted in the offspring (Exhibit "1"). Therefore, source of Exhibits "2" & "3" can be excluded from being the biological mother and father, of the source of Exhibit T.

CONCLUSION

The DNA test (STR analysis) performed on the exhibits provided is sufficient to conclude that the Exhibits "2" and "3" are not the biological parents of the Exhibit "1".

9. Counsel for the respondent No. 7 sought to raise objections claiming that at the FSL, Rohini, double blind coding system had not been followed while taking samples. The Director V.K. Goyal and Mr. A.K. Srivastava, Senior Scientific Officer of the FSL, Rohini, explained that the blind coding method is followed in laboratories where there are a large number of samples and more than one Investigator is there, so as to maintain complete secrecy with regard to the identity of the persons, at FSL, Rohini, all the tests are conducted by Mr. A.K. Srivastava, who is a Senior Scientific Officer and is fully responsible for confidentiality and to ensure that there is no tampering with the samples. Accordingly, there was no occasion to follow the blind coding method as there is only one expert carrying out the tests.

10. During the course of hearing, we had enquired from Mr. A. K. Srivastava and the parties if they were known to each other. Mr. Srivastava and the parties replied in the negative. Mr. Srivastava stated that none of the parties have ever contacted him directly or indirectly and counsel for the parties also accepted this position. In these circumstances, in our view, the objection regarding blind coding method sought to be raised is without any substance or merit. Reference may usefully be made in the judgment in Goutam Kundu Vs. State of West Bengal and another, where the Supreme Court while dealing with a question of disputed paternity, held that blood grouping test is a useful test to determine the question on disputed paternity. It can be relied upon by the Courts as

circumstantial evidence, which ultimately excludes certain individuals as the father of the child. We may also notice that even the preliminary blood grouping of the child was not matching with respondent No. 7 and his wife, who claim to be the biological parents.

11. It is not necessary in these proceedings for writ of habeas corpus to dwell any further on the question of paternity. The paramount consideration before the Court while considering the question of interim custody of the child is the welfare and best interest of the child, to be ensured.

12. Let us consider and analyze as to where the welfare of the child rests. Petitioner Noor Mohd. and his wife are admittedly not the biological parents of the child Farooque @ Sonu. Having six daughters and son, they had readily accepted and started rearing Farooque @ Sonu. During the period of nearly four years, Farooque @ Sonu was with the petitioner and his wife, it has, not been displayed that they are capable of taking good care of the child. After the initial admission, Farooque @ Sonu remained out of school and simply assisted the petitioner, who was carrying on his vocation as a welder. Thus, Farooque @ Sonu was simply used as a helping hand. Respondent No. 7 is a mason having 10 children. He has admitted that presently, he is on hard times and his cattle and land etc. have been sold by him. Besides, in the affidavit filed, respondent No. 7 has not been able to give the place, time and date of birth of Farooque @ Sonu, claimed to be his son. Hence, neither petitioner nor respondent No. 7 emerge as responsible parents, who could be entrusted with the care of the child when the paternity is in dispute.

13. It is not necessary to dwell into veracity or otherwise of the report for kidnapping lodged and whether Farooque @ Sonu is the kidnapped child or not. It is sufficient to notice that the DNA test has prima face shown that respondent No. 7 and his wife are not the biological parents and petitioner and his wife as noted before, have not acquitted themselves as responsible foster parents to ensure well being of the minor child. These questions would be finally adjudicated if at all in guardianship or paternity proceedings or in the course of trial under the offence u/s 364-A IPC.

14. The Court, in cases where the parental care or guardians are not available, acts as *parens patriae* and directs suitable arrangements being made for the care and upkeep of the minor. We find this to be in conformity with the Convention of the Rights of Child. Reference is invited to Article 20 of the said Convention, as adopted by General Assembly of United Nations on 20th November, 1989:

Article 20 : Parentless Children

(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests, cannot be allowed to remain in that environment shall be entitled to special protection and assistance provided by the State.

(2) State parties shall in accordance with their national laws ensure alternative

care for such a child.

(3) Such care could include, inter alia, foster placement Kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

India granted accession to the Convention on 11-12-1992.

Further the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children provides that:

Article 4 : When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute foster or adoptive family or if necessary, by an appropriate institution should be considered.

Article 5 : In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care should be the paramount consideration.

Article 6 : Persons responsible for foster placement or adoption procedure should have professional or other appropriate training.

15. In the present case, as would be seen, Farooque @ Sonu would have been under considerable emotional stress. He has lived with the petitioner for over four or five years when respondent No. 7 appeared on the scene. He was taken away by respondent No. 7 and his wife as their biological child and remained with them from November, 2005 to May, 2006. These upheavals and change of habitat for the child were best avoidable. As noted by us earlier, neither the petitioner nor respondent No. 7 and his wife appear to be capable of looking after the welfare and best interest of the child. In keeping with the rights of child and the provisions noticed above, where care by the child's own parents is unavailable or inappropriate, care by substitute, foster or adopted family should be provided by the State. Keeping these factors in mind, vide orders dated 24-5-2006, we had directed SOS Children's Village of India to make necessary arrangements as required for minor's upkeep, schooling etc. Mr. Pradeep Jharwal was appointed as guardian of the child and was required to submit monthly report regarding the progress of the child.

16. At this stage, we may note that in the matter of "Pratidhi v. NCT of Delhi and Ors. reported at 2001 (2) AD Delhi 169 : 2001 AIHC 3767 while looking for an appropriate available institutional option for the custody of an orphan girl, one of us (Manmohan Sarin, J.) had the opportunity to visit SOS Children's Village of India. Abandoned children live in separate cottages as brothers and sisters and part of a family under the care of an educated lady, generally a widow or a spinster called "Mother". A "Mother" is put in charge of 6 to 10 children and she looks after their needs, monitors their education and they all live like a family

sharing and performing domestic and household chores. This fulfills, to the extent possible, the emotive need of children. Farooque @ Sonu was brought to the Court by Mr. Pradeep Jharwal, Village Director of SOS Children's Village. We spoke to the child in chambers separately and in the presence of Mr. Jharwal. The child appeared to be cheerful, well groomed and looked after. He mentioned that he has been performing his religious rituals such as reading of the "Namaz" and was comfortable. We are satisfied that the children's interests and welfare is being taken care of. Our order of 24-5-2006, sending the child to SOS village and appointing Mr. Pradeep Jharwal as the guardian of the child, would continue. The SOS Village would submit to the Court a quarterly report regarding the progress and development of the child.

17. We wish to make it clear that observations made in this judgment while deciding the petition for habeas corpus and the directions given for the upkeep and custody of the child, shall not, in any manner, affect the investigation or the trial of the kidnapping case registered vide FIR No. 7/2000 u/s 364-A IPC, PS Budhana, U.P. or for that matter, preclude any of the parties from seeking to establish its rights in a paternity or guardianship suit.