
(1986) 02 MP CK 0017
In the Madhya Pradesh High Court

Pota	Vs	APPELLANT
State of Madhya Pradesh and Others		RESPONDENT

Date of Decision : 24-02-1986

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1987) CriLJ 1585

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

Bench : Division Bench

Judgement

T.N. Singh, J.—Nearly five months ago the curtain was raised in an eerie episode. On several dates, thereafter, variegated scenes came to be enacted in this Court. Today the curtain must drop as the last scene of the drama, happily, was enacted by counsel and parties to bring the matter to a neat end. Before we proceed to the core of controversy we would like to record at the outset our thanks to the local Ramkrishna Ashram and place on record our appreciation of the assistance and co-operation which we received from Swami Vimuktanandji of the said Ashram.

2. The tussle is for the custody of the sweet child, who came before us on different dates, called by the petitioner Rekha, while the child herself has repeatedly given her name as Lata. We had occasions numerous to hear her alone and talk to her and also hear her and watch her in the presence of the counsel and the two contenders. She is definitely an intelligent child and we are definitely bound not to ignore her preference in this matter. She is aged about six years now and quite intelligent by any standard to express her mind and also about matters which relate generally to her welfare. Whatever that be, Pota, the petitioner, who claims that she is his child Rekha, has claimed her custody mainly on the ground that she was with him on 30-7-1985 and she was removed from his custody on that date by Agra police making it necessary for him to lodge a complaint in writing on 31-7-1985 with the Superintendent of Police, Morena. The said report is Annexure-1 to the petition and the other papers are a

telegram, a photocopy of a Newspaper report and lastly a notice for demand of justice by the counsel on the State. This was done on 17-8-1985 though the petitioner came to this Court praying for a writ of habeas corpus only on 30-10-1985.

3. On petitioner's prayer respondent No. 6, Fatehsingh, was later impleaded along with the Superintendent of Police, Agra, and Bachulal Verma, Sub-Inspector of Police, P.S. Jagdishpura, Agra, (respondents Nos. 4 and 5). On 12-10-1985, and later, on 4-10-1985, on specific prayer being made in that behalf by the petitioner we directed Fatehsingh and Bachulal Verma to produce the girl Rekha alias Lata in the Court. Because, only later it was disclosed to us that it was Bachulal Verma who came with Fatehsingh and removed the girl from the petitioner's custody. Eventually, on 29-1-1986, the girl came to the Court with Fatehsingh. On that date, Sub-Inspector Bachulal Verma also came and the matter was heard in Chambers in the presence of the counsel and the parties. That day itself we requested Sri R. A. Roman, Deputy Government Advocate, to obtain medical opinion on the question of parentage of the child because Fatehsingh claimed that he was the girl's father, contesting petitioner's claim.

4. The medical report was submitted on the next date, when we heard the matter again, albeit inconclusively. In the course of resumed hearing of the matter on 31-1-1986, after hearing Dr. Mrs. Trikha of Pathology Department of Gwalior Medical College, and the counsel for the parties, we took the view that pending further investigation the custody of the child be entrusted to Swami Vimuktanandji of Ramkrishna Ashram, Gwalior. Since then the child was with him until she is produced today in this Court, when we again talked to her. We also allowed the child earlier, and also today, to talk to the petitioner, his wife and his son. Respondent No. 7, Fatehsingh, his wife Premawati and their five children present today, were also allowed to talk to the child. This was done separately and also in presence of the counsel for the parties. However, we would like to make it clear here at this stage that proceedings all through and at all stages had been in camera. We might, even at this stage, at once speak of our impression of the child and her attitude to the rival contenders. We found it to be the same all through, since she was produced before us, first on 29-1-1986 and now again today on 18-2-1986. She has expressed preference all through to stay and live with Fatehsingh, whom she has repeatedly and categorically identified as her father. When Premawati, Fatehsingh's wife, came today she immediately identified her as her mother and the other children as brothers and sisters. Although Shri Swatnisaran, appearing for the petitioner, made a serious contention that the child having remained in the custody of Fatehsingh and his family for the last seven months, it was natural for her to express affection for that family, today we find little force in this contention as the facts disclose otherwise. Even if it be assumed that during the last seven months she had undergone a psychic change living with an alien family, that influence was washed away by her isolation from them during the last seventeen days, when she remained in custody of Swami Vimuktanandji, and neither parties having any

connection with her, by this Court's order. Indeed, this order, we are happy to observe, has been duly complied with religiously by both sides.

5. Since Shri Swamisan places reliance on several decisions for our consideration to contend that our jurisdiction under Article 226 of the Constitution is wide enough to grant the relief to the petitioner. See, Gohar Begam Vs. Suggi alias Nazma Begam and Others, ; Ranjgt Kumar AIR 1963 CaT 261 : 1963 (1) Cri LJ 579. Counsel also relied on a decision of this Court in Ramsewak 1965 Jab LJ 275 (CN) 46 : 1965 (2) Cri LJ 282 to submit that even in such a case because of a minor's welfare being of paramount consideration, we should seriously consider as to who was the "proper person" to be entrusted with the custody of the child. He is right in contending that and we are in full agreement with counsel's submission which we say is the only guiding principle for us to decide this matter. Because, despite our earnest endeavour to positively fix the parentage of the child with the help of medical evidence, our efforts took us no where. Yesterday we had before us the report filed by Dr. Trikha after examining Premawati, Fatehsingh's wife and evaluating her blood grouping with that of her husband. Earlier this exercise was done with respect to petitioner Pota and his wife. Both exercises have proved futile as nothing conclusive came out. Both sides have also relied on circumstances and documentary evidence to support rival claims to child's custody despite disputed parentage. We may briefly refer to the material produced in this Court. On the petitioner's side besides the Annexures, already referred to, three affidavits are filed, one is Pota's wife's, the other is Pota's mother's and the third is village Chowkidar's. A Panchnama is also filed. No family ration-card has been produced from Pota's side, but a gram-panchayat's note with a reference thereto is also filed. The last document we must immediately say has no value at all as indeed is of little relevance are the affidavits, which are of interested persons. As about Chowkidar's affidavit, we must say that the legal requirement being registration of births and deaths, even in villages, Chowkidar's affidavit cannot take its place.

6. On the other side, Fatehsingh has filed xerox copy of the entry in the births and deaths Register of Municipal Corporation, Agra, which is dated 24-10-1979 wherein it is mentioned that on 22-10-1979 a daughter was born to Fatehsingh and Premawati. A copy of the F.I.R. filed on 10-2-1984 by Premsingh, Fatesingh's brother, is also filed, wherein it is mentioned that since 4 or 5 days ago his niece Lata had beetvmissing from home. One Munna alias Maniram who was a tenant, living with the informant, left his house about the same time and this was seen by neighbours. On 29-10-1984 Fatehsingh himself lodged a F.I.R. with S.H.O., Aligarh stating that since 5-2-1984 his daughter Lata was missing. A copy of this complaint is also filed. He has also submitted a similar complaint to the S.H.O., Morena, on 29-6-1984 and its copy is also on record. One thing we must state at once, as Shri Swamisan has relied strongly on the fact that identity of the missing girl Lata mentioned in Fatehsingh's complaints is of signal relevance. That should be so. But the question is, if the description of the child in the F.I.R. to be deemed so conclusive as to negate all considerations. Because,

we cannot overlook the human factor that different people have different notions and, therefore, various descriptions of the same object may be given by different persons. The child was described as having fair complexion and golden looks. Shri Swamisan contends that the girl, who is produced in the Court, does not have fair complexion but we cannot ignore the fact that the description given in the F.I.R. was a description of the missing child two years ago. For two years she lived in different atmosphere with different people and in different conditions and that apart we may say that if the child, who is produced in this Court, is not fair complexioned she is also not dark. Her complexion can be said to be swarthy complexion. Indeed, such complexion in some quarters is accepted as fair complexion though we may not also ignore that she might have undergone physical, psychic and mental strain for the two years, if it is accepted that she was separated from her parents namely Fatehsingh and Premawati, who live in Agra under more happy and better circumstances. Shri Swamisan's case is also that the petitioner belongs to weaker section and is not well off and, therefore, he is under pressure. We do not accept that he is under any pressure as we have given fair and reasonable opportunity to both sides equally to prove their respective cases.

7. What we find, very material in this case to deny relief to the petitioner is that there is no material before us to hold that he is the "proper person" who should be given custody of the child, even if to take the view that the parentage of the child has remained undecided. Our attention is drawn to the return filed by the respondent No. 3, the Superintendent of Police, Morena. We have perused Annexures R-1, R-2 and R-3 of the said return. There are several allegations against the petitioner, Pota, and his family and indeed it supports the case of Fatehsingh that his daughter was abducted by petitioner's brother-in-law, Maniram, and further that the said Maniram was a notorious being involved in similar other cases. The admitted position in this case also is that the girl; whom petitioner calls Rekha, even according to the petitioner, was removed not from his house but from his brother, Phoda's house and, therefore, a complaint was lodged by him stating therein this fact categorically; copy of this is filed by Fatehsingh with his return. The other important aspect of the case is that one material episode, which preceded petitioner's complaint, had been completely shadowed by the petitioner, coming to the light only through the return of respondent Fatehsingh or from the return of other respondents. In his complaint, not in Morena Court but in Agra Court, on 21-8-1985, the petitioner alleged that his daughter Rekha was found by him in Fatehsingh's custody and the girl should be recovered and entrusted to his custody. Why indeed the petitioner did not take any steps at Morena which was the place from where the girl was removed from his custody is left doubtful to cloud his conduct. All through the petitioner's conduct does not appear to be fair in any respects as he is trying to play hide and seek not only with this Court but with Agra Court as well.

8. Shri Swamisan has submitted that it was the duty of the Superintendent of Police before whom application was filed on 1-8-1985 to have the matter

enquired into and, therefore, it was not necessary for him to lodge a complaint in Morena Court. We have not been convinced that any illegality or impropriety in the matter has at all been committed by the Morena police or Superintendent of Police, Morena, himself. There is thorough inquiry in the matter on the petitioner's complaint made to the Superintendent of Police as appears in the State's return and the Annexures above referred :

9. We do not find any substance in Shri Swamisan's contention that the investigation by Superintendent of Police or higher officials do not fulfill the statutory requirement because we have- no material before us to hold it true, as contended, that the petitioner had at any time made any effort to lodge F.I.R. with Morena Police and he was not allowed to do so or that his information was not recorded.

10. We are moving in twilight zone in this case, the only light coming to us is from the decision of their Lordships of the Supreme Court in the case of Mohd. Ikram Hussain Vs. State of U.P. and Others, . It was held in that case that although a writ of habeas corpus is a writ of right, it is not a writ of course. It was authoritatively held further that "because the writ of habeas corpus is festinum remedium (and) the power can only be exercised in a clear case". It was further held that "It would be singularly inappropriate to exercise the power in a case "where the petitioner himself is charged with a criminal offence in respect of the very person for whose custody he demands the writ". In the instant case, whether the petitioner is accomplice or not in the abduction case pending trial in Agra Court for abduction of Fatehsingh's daughter, facts are vocal to suggest that his complicity in the crime cannot be totally negated. His hands do not appear to be free or clean, as we find from the materials on record. That being the position we only conclusively conclude that in this case he is not entitled to demand custody of the child Lata alias Rekha as he neither appears to be "proper person" to have her custody nor we find it to be a clear case in which we can hold him to be the father of the child so that he can legally claim the custody of the child. On the other hand, materials before us suggest that respondent Fatehsingh can be accepted as "proper person" to be given custody of the child as there is no allegation against him that he illegally or surreptitiously removed the child from the petitioner's custody. He took law's help to do so and has acted bona fide. The girl has also expressed clearly and categorically her preference to go with him and live in the family which, according to her, comprises of her mother, brothers and sisters. Indeed, circumstances of respondent Fatehsingh are conducive for the welfare of the child. Petitioner's remedies in civil Court are not barred; it may be possible for him to establish his civil right there. It may be possible for him to establish his claim, founded on parentage. But, we must refuse him the writ of habeas corpus.

11. For the foregoing reasons we find no substance in this petition, which is accordingly dismissed. Rule nisi is discharged. Let the child be restored to the custody of Fatehsingh, respondent No. 6, who has produced the child in this

Court pursuant to this Court's order.

12. Before we part with the records, as prayed by Shri Swamisaran we would like to make it clear that the observations herein made shall not be treated as binding on any Court, civil or criminal, in which the issue of paternity of this child is litigated at any time.