

(1994) 05 DEL CK 0102

In the Delhi High Court

Case No : Civil Writ Petition No. 470 of 1992

Puran Chand

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 18-05-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 164, 491

Citation : (1994) 54 DLT 573 : (1994) 30 DRJ 13

Hon'ble Judges : K. Shivshankar Bhat, J

Bench : Single Bench

Advocate : K.K. Luthra, I.L. Kapoor, Siddharth Luthra, R.P. Luthra and R.C. Chawla, for the Appellant;

Judgement

K. Shivashankarbhat, J.

(1) In view of the difference of opinion between the two learned Judges of this court the writ petition has been placed before me for disposal. Earlier a Bench of this court heard the matter. While Y.K.Sabharwal,J.tookoneview,S.C.Jain,J. took another view.

(2) The petitioner seeks a writ in the nature of Habeas Corpus for the production of his two sons-Gian Chand and Bharat Bhushan. However, the prayer relating to Gian Chand does not survive because admittedly he has returned to the petitioner on 6.8.1993. The writ petition was filed on 21.7.1993. Petitioner, his wife, his two sons, his father and 4 brothers and the wife of a brother were living together in GeetaColony,Delhi. It is stated that on 27.4.1993 petitioner"s wife was murdered and the allegation is that a brother of the petitioner committed this murder. According to the petitioner, he was busy in connection with the funeral ceremony of his wife and at that time his two sons were removed from his custody and have been kept at a secret place. When he lodged complaint with the Police no action was taken. In these circumstances he filed the present petition.

(3) The petitioner alleges that children were taken away by respondents 3 to 7, of whom respondents 2 & 4 are the brothers of the petitioner's wife, the 5th respondent is the son of 4th respondent the 6th respondent is the father of his wife and the 7th respondent is related to them. In the counter affidavit filed on behalf of the State and the Police it is stated that a first information report was lodged on 27.4.1993 about the killing of the wife of the petitioner. According to the said information the petitioner's wife was killed by his brother Madan Lal in the presence of the petitioner by causing injuries on the neck. In this information it was also stated that the petitioner's son Bharat Bhushan was also an eye-witness to the murder. This counter also states that the police recorded the statement of Bharat Bhushan, in question and answer form because he is a child, wherein Bharat Bhushan stated that his mother was killed by Madan Lal in his presence. When the child was produced before the Metropolitan Magistrate his statement was recorded u/s 164 of the Criminal Procedure Code and after recording of the statement the learned Magistrate asked the child as to where he would like to go. The child seems to have replied that he wanted to go with his maternal uncle, since his mother was killed by Madan Lal. Accordingly, Bharat Bhushan was sent to his maternal uncle. Therefore, there was no illegal detention of Bharat Bhushan. This affidavit refers to one Kishore as the uncle of Bharat Bhushan, an obvious mistake, because I find that Kishore is the son of the 4th respondent. The recorded statements of Bharat Bhushan is found amongst the writ petition papers. In this statement the age of the elder brother of the child is given as 5 years while the age of Bharat Bhushan is stated as 6 years by the said Bharat Bhushan. The learned Magistrate also recorded that the age of the child was about 6 years but he did not give the name of the school and of his friends and that the boy was very slow in answering questions and replied only after asking the questions many times and that he was very reluctant in answering many questions. There is also a reference to Kishore uncle in the statement given by the boy and it is recorded that the said Kishore pacified the boy when the boy started weeping, 4th respondent has filed his affidavit wherein he states that the mother of the child was killed by the brother of the petitioner in the presence of the child and that the child was examined as a witness in the court and that in the course of examination the child informed the court that he does not want to go to his father. The said statement also is annexed to the affidavit. The 4th respondent gives the following reasons as to why the child should not be given to the petitioner:- a) The mother of the child was murdered in his presence and that would be having horrifying effect on his mind. b) The accused is the brother of the petitioner and they all have been living in a joint family. Obviously, the child would be tortured by the family members and he may even be hurt or something wrong may be done to him for giving evidence against one of the members of the family. c) The petitioner himself who is the father of the child has yet to be examined in the said case. d) The deponent as also other relations with whom the child is residing are related to him from his maternal side. The deponent is his maternal uncle and their relationship with each other has been stated herein above. e) The child has been

residing with the deponent for the last over 7 months and is being looked after by the deponent and other members of his family as also the other maternal relations of the child. He is having education in school and at one stage the petitioner informed this Hon"ble Court that he was having some disease and the deponent is regularly getting him checked up from the hospital. The deponent and other maternal relations of the child are thus in a better position to look after the child and hence it is in the interest of justice that the custody of the child be allowed to remain with them rather be given to the petitioner in whose hand the child would not be safe.

(4) The petitioner has filed one more affidavit in which he has asserted that the child is being fed wrong information and that the child was being poisoned in his approach towards his father by those in the house of the contesting respondents. The petitioner also stated that he is a graduate and is quit well settled in life. He further pointed out that the child Bharat Bhushan was being sent by him earlier to a nearby school and there was also a private tuition arranged by him, and in these circumstances he reiterated his prayer for the return of the child to him.

(5) The question, Therefore, is whether the petitioner is entitled to the custody of the child Bharat Bhushan or whether the contesting respondents 3 to 7 could claim to retain the child with any one of them. The main basis for the claim of the contesting respondents is that Bharat Bhushan is an eye-witness to the murder of his mother and the accused is the brother of the petitioner and if Bharat Bhushan goes to his father he is likely to be tortured by other members of the family to prevent him from deposing the truth in the court.

(6) I have already quoted five reasons given by the 4th respondent in his affidavit. The first reason that the death of the mother would have a horrifying effect on the mind of the child, is no ground at all to keep away the child from his father unless there are special features of the case which would indicate that the alleged effect would not be or could not be erased if the child were to be with the father. In fact there is no particular assertion that the murder had a horrifying effect on his mind. The statement made/ as quoted by me is only inferential- "could be having a horrifying effect". It does not say that it has made a horrifying effect. The other reasons given are again based on mere suspicion. There is absolutely no material to indicate that the child would be tortured by other members of the family. It should be remembered that the relationship between the petitioner and his late wife was quite cordial; and it is not the case of the contesting respondents that at any time the deceased had any complaint against her husband or of any ill-treatment against any member of the family. In these circumstances it will be a baseless suspicion to attribute motives to other members of the family that they are likely to torture the child because he was an eye-witness to the murder. It is also necessary to note here that the petitioner himself gave the complaint of the murder. In no way ,he sought or tried to shield his brother who is alleged to have committed the murder. The ground (e) referred above also is no ground. Only because the child happens to be residing

with contesting respondents (4th respondent) for over 7 months is not a reason to permit the continuation of such residence against the wishes of the natural guardian. May be the child was being looked after very well. I am also assuming that the child is being sent to the school and that some medical treatment was being given to the child by the 4th respondent. But it is not the case of the respondents that the petitioner was denying the child the benefit of the education or that the petitioner was not getting the child medically treated. In fact the petitioner has asserted that the child was being admitted in the school which was quite close to the house of the petitioner and even a private tuition was arranged for his benefit. This is not a case where the custody of the child is sought to be denied to the petitioner because he is not looking after the child properly. For the purpose of this case it has to be assumed that the petitioner was maintaining the child properly, giving him all the facilities and providing him proper atmosphere for studies. The concept of welfare" of the child is not to be decided on the mere fact that the child was being looked after well by his maternal uncle or by someone else. In the instant case this is a common factor available to both the contesting parties. Apart from other facilities a child requires paternal care and affection. There is absolutely no material on record to indicate that the petitioner has denied any affection to his son Bharat Bhushan. No amount- of looking after by any one else could compensate for the loss of parental affection which is one of the major nourishing elements which would contribute for the growth of the child.

(7) A few decisions were cited before me about the approach to be adopted by the court in a situation like this. The learned counsel for the petitioner referred to the case of Gohar Begam Vs. Suggi alias Nazma Begam and Others, . In that case the appellant was the mother who applied for the custody of her minor illegitimate daughter of 6 years. The child was in the custody of her mother"s sister. The Supreme Court upheld her claim. It was pointed out that under the Mohammedan Law the mother was entitled to the custody of the child and the respondent had no legal right what so ever to the custody of the child. At page 95 the Supreme Court observed that the refusal of the respondent to make over the child to the appellant resulted in an illegal detention of the child with in the meaning of Section 491 Cr.P.C. The court quoted an observation of Lord Campbell, CJ. to the following effect:-

"But with respect to a child under guardianship of nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."

(8) The Supreme Court held that there is no reason why the appellant should have been asked to proceed under the Guardians and Wards Act for recovering the custody of the child, because he had also a clear right to an order for the custody of the child u/s 491 of the Code (the same observation would equally apply to invoking of writ Jurisdiction diction under Article 226 of the Constitution of India). The Supreme Court also referred to another decision wherein it is

stated that if the infant is brought before the Court by Habeas Corpus and if he be of an age to exercise a choice, the court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

(9) In the present case the child is admittedly of about 6 years. I do not think he could exercise a proper choice, especially when he has been residing with the 4th respondent all these months. No useful purpose will be served by examining him to find out his choice, especially in the background of the facts stated by him. What is good for the child shall have to be decided by the court.

(10) In the aforesaid decision of the Supreme there is a reference to a decision of the Madras High Court in S. Rama Iyer Vs. K.V. Nataraja Iyer, .

(11) The Bench of Madras High Court in Rama Iyer's case held that a child of 13 years cannot form intelligent preference in matter relating to his custody. It was a case where the opinion of the minor was induced by his maternal grand father with whom the child was staying and the child refused to go to his father. The Madras High Court did not accept the choice of the child having regard to the tender age of the child. The bench observed at page 297 as thus:-

"In the present case also we are definitely of the opinion that the present attitude of the boy is induced by his maternal grand father. But even otherwise we agree with great respect with the learned Judges who decided the two cases cited above that the minor's opinion in circumstances such as are bound in this case is not entitled to any weight at all "

(12) In Kumari Sunita and Another Vs. Smt. Shyam Kali, , a learned Judge of Allahabad High Court also observed that a child of 12/14 years cannot form an intelligent preference in matter relating to his custody.

(13) The learned counsel for the respondent however, relied on a reasoned decision of the Supreme Court in Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and Another, . It was a case where the husband and wife were fighting. In fact they had also filed a petition for divorce which was pending. The child was being brought up by the maternal grand father, since the two parents were away in America. The dispute regarding the custody reached the Supreme Court, which arose out of certain orders of the Magistrate. The Supreme Court thought it fit to put an end to the litigation between the two parents. The Supreme Court having regard to the admitted position, made a decree for divorce even though the proceedings were . still pending in the court of the District Judge. In that connection the Supreme Court also made an order regarding the custody of the child. There is an observation ip para 7 of the Judgment that the Supreme Court had talked to the child in the chamber and gathered here wish and sentiments and she was found to be an intelligent girl. Though she had ample love and affection for both her parents, she liked her maternal grand father also. Thereafter the Supreme Court proceeded to say that

"after examining every possible angle and that it would be in the interest and welfare of the minor Soumya that she should be permitted to be in the custody of her mother-Chandrakala". The ultimate order of the Supreme Court is not based on the wish and sentiments expressed by the child, the order was based on several factors as is clear from the above observation.

(14) Bharat Bhushan has an elder brother Gyan Chand. He may be 9 or 10 years of age; his companionship to the young Bharat Bhushan will be available in case Bharat Bhushan is given to his father. This aspect cannot be brushed aside as irrelevant.

(15) In the circumstances, I am of the view that the petitioner is entitled to the custody of the minor child Bharat Bhushan. The respondents are directed to hand over his possession forthwith. The learned counsel for the contesting respondent submitted that the child will be handed over to the petitioner in this court tomorrow at 10.30 A.M.. The petitioner is directed to be present to receive the child. "The writ petition is allowed accordingly.