

(1999) 11 DEL CK 0044

In the Delhi High Court

Case No : Criminal W. 113/99, Criminal M. No"s. 3581 and 3596/99

Richa Bhasin

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 22-11-1999

Acts Referred:

Citation : (2000) 3 AD 212 : (2000) 84 DLT 190 : (2000) 52 DRJ 803 : (2000) 4 RCR(Civil) 67

Hon'ble Judges : R.S. Sodhi, J;A.D. Singh, J

Bench : Division Bench

Advocate : Ms. Geeta Luthr, for the Appellant; Mr. K.C. Mittal, Standing Counsel, Mr. D.D. Thakur and Mr. Naveen Chawla, for the Respondent

Judgement

Anil Dev Singh, J.—This is a writ petition under Article 226 of the Constitution, whereby the petitioner claims a writ of habeas corpus for production of the petitioner's children Aporov, aged 4 years and Ananya, aged 2 years alleged to be in illegal custody of the third respondent who happens to be her husband and the father of the children. The facts giving rise to the petition are as follows :-

2. The petitioner Richa was married to the third respondent Anil Bhasin, on May 28, 1991, at New Delhi, as per the Hindu rites. She gave birth to a male child Aporov and a female child Ananya. It is claimed that the age of Aporov is 4 years, while that of Ananya is 2 years. According to her, the third respondent is of a violent and unstable nature, due to which the marriage has irreconcilably broken down. The petitioner in her affidavit dated May 3, 1999 has made the following allegations against the third respondent :-

1. In August 1992, the third respondent physically assaulted the petitioner and pushed her out the matrimonial home late at night.

2. In July 1993, the third respondent hurled verbal abuses on the petitioner. He also burnt her with cigarette stubs.

3. When their elder child, Aporov was one and a half years old, the petitioner conceived their second child and hence needed rest. She was however, forced to take care of him and all his needs, as the third respondent and his family members were not willing to look after him. Due to strain, the petitioner suffered a miscarriage.

4. On January 12, 1997, the third respondent flew into a rage, since the petitioner declined to have sex with him, as a month earlier, she had given birth to the second child Ananya and had been advised abstinence for a period of six weeks. On her refusal, the third respondent took out his revolver and threatened to kill her.

5. The third respondent being of a suspicious nature used to follow the petitioner to the gymnasium, where she would go for workouts. Even when she went out with her female friends, he would follow her. On one occasion, when one of her female friends sent her roses he insinuated her to be a lesbian.

6. The third respondent made allegations against the petitioner about her relationship with her brother-in-law, Mr. Manvendra Shukul.

7. The third respondent even resented the existence of the children, as he held them responsible for ruining his social life and youth. He once slapped Ananya, when she was five months old for crying at night.

8. On May 27, 1998 when the petitioner affectionately cuddled her son Aporov, the third respondent accused her of deriving physical gratification from him.

3. The petitioner on June 6, 1998 filed a petition u/s 13(1)(ia) of the Hindu Marriage Act on above grounds for dissolution of marriage with the third respondent. However, this petition was subsequently withdrawn as the petitioner and third respondent filed a joint petition u/s 13B(1) of the Hindu Marriage Act for a decree of divorce by mutual consent being HMA. No. 832/98 before the District Judge on August 21, 1998, Along with the agreement dated August 20, 1998, between the third respondent and the petitioner represented through Ms. Tanveer Shukul, the petitioner's sister and her attorney. A joint statement of Ms. Tanveer Shukul and third respondent were also recorded by the District Judge. As per the joint statement and the agreement, the custody of the children was to vest permanently in the petitioner and they were to stay with her wherever, she lived. In case, the petitioner was to live outside India, Along with the children, she would bring them to India, once every year for 15 days, so that the third respondent could meet the children during this period. The expenses for the visit were required to be borne by the third respondent. The third respondent agreed to hand over a sum of Rs. 15 lakhs to the father of the petitioner Shri B.K. Mishra at the time of signing of the first motion pursuant to which a draft for a sum of Rs. 15 lakhs was handed over by the third respondent to him. The third respondent also agreed to pay a sum of Rs. 20,000/- per month to the petitioner for meeting her day to day expenses and for the upkeep of the children. On September 1, 1999 the Additional Sessions Judge having regard to the

averments made in the petition and the joint statement of the attorney for the petitioner and the third respondent recorded the following order :-

"From the averments made in the petition which is supported by affidavits of both the parties as well as from the joint statement of Attorney for petitioner No. 1, namely, Ms. Tanvee Shukul and petitioner No. 2 recorded on oath Separately, I am satisfied that the parties were married on 28.5.1991 in accordance with Hindu rites and ceremonies at Delhi; that the parties have been living separately since 30th May, 1997 and have not been able to live together since then, and that the parties have mutually agreed that their marriage may be dissolved. This petition complies with the provisions of Section 13-B(1) of the Hindu Marriage Act and accordingly, this petition be kept on record.

Parties may move joint 2nd motion u/s 13-B(2) of the Hindu Marriage Act in accordance with law within the statutory period of limitation. File be consigned to record room".

4. The further case of the petitioner is that on February 6, 1999 the third respondent Along with the sixth respondent one Sunil Kumar, came to the house of the petitioner and threatened & intimidated her. The third respondent is stated to have told the petitioner that he will remove the children from her custody and kill them in order to make her suffer. Thereafter, the third respondent actually removed the children with the aid of the sixth respondent from her custody. The petitioner concerned with the safety of her children, called upon the fourth & fifth respondents, parents of the third respondent to enquire about their whereabouts. The fourth and fifth respondents refused to talk to the petitioner and told her that the third respondent has rightly removed the children from her custody. Thereafter, the petitioner filed a complaint on February 7, 1999 at Police Station defense Colony. On the basis of the complaint, a first information report was registered. Thereafter on February 7, 1999 she also filed the instant petition.

5. On February 10, 1999, show cause notices were directed to be issued to the respondents with the direction to the third, fourth, fifth and sixth respondents to produce Aporov and Ananya in Court. On April 21, 1999, the counsel for the State, on instructions stated before us that the third respondent Along with the children had left the shores of the country on February 7, 1999. He also stated that the Investigating Officer had requested the Ministry of External Affairs for impounding the passport of the third respondent. According to the petitioner, the third respondent had secreted out the children from the country on forged passports.

6. It appears that due to the steps taken against the third respondent he returned to the country and on April 30, 1999, appeared in Court along with the children. On that date, it was directed that the children Aporov and Ananya would reside with the petitioner. At the same time the petitioner was interdicted from leaving the jurisdiction of this Court till the disposal of the writ petition. It was also directed that the petitioner shall produce the children in Court, on the

next date.

7. The third respondent in his affidavit dated September 27, 1999, the fourth & fifth respondents in their joint affidavit dated March 18, 1999 and third respondent in his application dated April 30, 1999, have denied the allegations of the petitioner and given a counter version of the events which is as follows :-

8. The petitioner and the third respondent were married on February 28, 1991. The petitioner did not have any complaint with her matrimonial life for seven long years. In the matrimonial home, the petitioner commanded respect and all comforts & luxuries were available to her. In February 1998 she wanted to go to New York for a short training programme. Having regard to her desire, the third & fourth respondents made all the arrangements and bore the expenses for the said trip. During her stay in the USA, she got in touch with one Manish Gupta who had studied with her. On May 15, 1998 the petitioner without informing the third respondent and his family members executed a power of attorney in favor of her sister Ms. Tanveer Shukul for the purposes of initiating proceedings for dissolution of marriage with the third respondent and for other matrimonial reliefs. Despite the aforesaid step taken by the petitioner which was not disclosed to the third respondent she continued living normally with the family, so much so that she accompanied the third respondent to Goa on May 24, 1998, for a short sojourn. She took the trip even while she had already made a plan for proceeding with the children to USA for an indefinite period of time. This is apparent from the following recital contained in the power of attorney which she executed in favor of her sister :

"Whereas, I am a resident of India but I am proceeding to America for an indefinite period."

9. In order to undertake the visit, three air tickets were booked by her on May 20, 1998 through Vam Air Travels without the knowledge of the third respondent. An Invoice No. 518 dated May 26, 1998 for an amount of Rs. 1,07,500/- was raised by the Travel Agent (See : Annexure R-1A). On June 5, 1998 the petitioner filed a petition u/s 13(1)(a) of the Hindu Marriage Act for divorce against the third respondent on the ground of cruelty. The factum of filing of the petition was not made known to the third respondent and his parents. On June 7, 1998 the petitioner told the third respondent that she would be visiting her parents along-with the children for a couple of days. On June 9, 1998, the third respondent visited the parental house of the petitioner but found neither the petitioner nor the children. He was told that the petitioner along with the children had left for USA. This was the first time that the third respondent was made aware of this development. He was not even told about the whereabouts of the petitioner in USA. On telephone from USA, she informed the third respondent that she wanted to marry Mr. Manish Gupta. She is also stated to have told the third respondent that in case he wanted to see his children, he must agree to the divorce and her other demands. On July 15, 1998 the petitioner again called the third respondent from USA on his cellular phone. From this call he was able to trace the telephone

number of the petitioner in USA, which was : 001 617 3540117. Thereupon the third respondent went to USA and on the basis of the telephone number located the apartment where the petitioner was staying. It was found that she was staying with Mr. Manish Gupta. Having found that the third respondent hired a private detective agency in USA for keeping a track of the activities of the petitioner. It is however, not necessary to refer to the reports of the private detective agency for the present.

10. On July 23, 1998 the third respondent is said to have met the petitioner at the gate of the apartment of Mr. Manish Gupta. The third respondent was allegedly threatened by Mr. Manish Gupta and was asked to leave USA. After that encounter, the third respondent came back to India. The third respondent in order to save his matrimonial home, the future of his children and to avoid harassment to his family members, executed the aforesaid agreement dated August 20, 1998 and acted as per the wishes of the petitioner and even paid an amount of Rs. 15 lakhs to his father-in-law to get back his children from USA. Having complied with the demands of the petitioner, the third respondent received a call from the petitioner, requiring the third respondent to come to USA bringing her back to India. Thereupon the third respondent went to USA on August 23, 1998 and on August 26, 1998 returned to India Along with the petitioner and the children. The petitioner on landing in India went straight to her parents house, Along with the children. On December 8, 1998 the third respondent was informed by the police that they had found the children roaming colony unattended. As per the version of the third respondent the custody of the children was handed over to him. Notwithstanding the neglect of the petitioner, the third respondent handed over the children to her. On January 17, 1999, the third respondent was gain informed by the police that the children were found roaming in the colony. The custody of the children was given to the third respondent by the police. From January 17, 1999, the children remained with the third respondent. The third respondent thereafter, on February 6, 1999, left India Along with the children and returned with them on April 29, 1999.

11. During the course of the proceedings several sittings were held to help the parties to resolve their disputes. They were asked to make adjustments and sacrifices for the sake of the children so that they could grow up in a normal family environment. We were hopeful that the petitioner and the third respondent would reconcile if proper counselling is given to them. We, Therefore, requested Ms. Sadhna Ramachandran, Advocate to render her expert services to the petitioner and the third respondent for counselling them. The parties appeared before Ms. Ramachandran but her efforts did not succeed. Two reports dated May 27, 1999, and July 19, 1999, were submitted by Ms. Ramachandran which are a part of the Court record. Ms. Ramachandran was of the opinion that the petitioner had shown disregard to the efforts made by her for bringing about reconciliation between the petitioner and the third respondent.

12. In the writ petition the petitioner claims custody of the children alleging that

the children are in illegal custody of the third respondent. It is well settled that in the matter concerning custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party.

13. It was claimed by the petitioner that the custody of the children before they were allegedly kidnapped by the third respondent was with the petitioner by virtue of the agreement dated August 20, 1998 and Therefore, the petitioner is entitled to be granted custody of the children. On the other hand, learned senior counsel for respondents No. 3 to 5 submitted that the third respondent had the legal custody of the children from January 17, 1999, when the same was given to him by the police. He submitted that the children were being neglected by the petitioner and on two occasions were found abandoned by her. He pointed out that the children were found roaming about in the colony by the police on December 8, 1998 and again on January 17, 1999. It was also pointed out by the learned senior counsel for the third respondent that the petitioner was working with an organisation called "Butterfly" which runs creches for children in Delhi and it was inter alias for this reason that children were neglected & abandoned and were found loitering in the locality by the police on two different dates. It was also asserted that the petitioner was seen with Mr. Manish Gupta at various places in Delhi without the children. It was for this reason that the custody of the children was retained by the third respondent after the children were given into his custody by ASI Jugal Singh who found the children crying near the house No. 36 Gulmohar Park on January 17, 1999. He also submitted that it will be against the interests of the children if their custody is given to the petitioner since she is bent upon wrecking the marriage for following an unchartered and uncertain course despite having been provided comfort and luxuries at the matrimonial home by the third respondent before she abandoned the same. He asserted that the third respondent wants to live with the petitioner so that the children could have a home. Learned senior counsel for the third respondent contended that in the circumstances, on April 30, 1999 when this Court directed that children were to reside with the petitioner, the custody of the third respondent was legal and Therefore, the instant habeas corpus petition should be dismissed and the custody of the children should be restored back to the third respondent.

14. On the other hand, learned counsel for the petitioner vehemently controverted the claim that the children were found abandoned on two occasions and were found by the police roaming about in the colony on December 8, 1999 and January 17, 1999. She also claimed that the DD entries No. 2 dated 8.12.1998 and No. 10 dated 17.1.1999 recorded by the police in this regard were false and fabricated. Learned counsel also vehemently denied the allegation that the children were in the custody of the third respondent since January 17, 1999 to April 30, 1999, the date when this Court directed that the children shall reside with her. She claimed that the third respondent kidnapped the children on February 6, 1999 while they were in her custody. She has also denied the overt and covert allegations of the petitioner regarding her relationship with Mr. Manish Gupta. Ms. Luthra also submitted that the third respondent is given to temper

and it will be highly unsafe to live with him. She claimed that the custody of the children should not be given to the third respondent as he has uncontrollable anger which can harm them.

15. Both the petitioner and the third respondent have staked their respective claims for the custody of the children. For this purpose they have tried to discredit each other. Learned counsel for the petitioner submitted that the custody of the children should be granted to the petitioner and the third respondent can be allowed to visit or meet the children on week ends but he should not be allowed to keep them overnight at his residence. It seems to us that it cannot be that they are her children throughout the year but his on week ends and that too during the day time only. It cannot be that his role should be confined to that of a provider for his children and not as father with whom the children can stay at night. We also do not agree with the submission of Mr. Thakur, learned senior counsel for the third respondent that in the instant petition the Court has only to see whether the custody of the third respondent was legal or not and unless the custody of the third respondent is found to be illegal, the Court should decline to interfere in the matter and restore the custody of the children to his client.

16. The question as to who was in legal custody of the children before the filing of the writ petition, is a disputed question of fact. In any case the Supreme Court in Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, did not approve the dismissal of the Habeas Corpus petition of the mother for the custody of her child, by the Punjab & Haryana High Court on the ground that the custody of the child with the father could not be said to be illegal. In this regard it was held as follows :

"It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without advertting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal.

It is difficult for us in this habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined. We, Therefore, direct that the learned District Judge, Chandigarh, will make a report to us before 23rd of this month on the question as to whether the custody of the child should be handed over to the petitioner-mother, taking into consideration the interest of the minor. The learned Judge will give liberty to the parties to adduce evidence on the question in issue. The learned District Judge may either take up the matter himself or assign it to an Additional District Judge, if there is any at Chandigarh."

17. Having regard to the aforesaid decision of the Apex Court, even if we were to accept the submission of Mr. Thakur that on April 30, 1999, when the children were directed to be handed over to the petitioner, the custody of the father was

legal, even then we have to decide as to which parent should have the custody of the children keeping in view their interest and welfare. Both the questions, namely, as to who was in legal custody of the children on April 30, 1999 and which parent should have their custody in keeping with their welfare are questions of fact. It is difficult for this Court, sitting in writ jurisdiction, to take evidence with regard to these questions. Since the questions have to be determined on the basis of evidence, we consider it appropriate to adopt the same course of action which the Supreme Court adopted in *D. Ramaswami Vs. State of Tamil Nadu* (supra) i.e. to refer the question to the District Judge for a report thereon.

18. Accordingly, we refer the matter to the learned District Judge, Delhi to make a report with regard to the question as to which of the parties was in legal custody of the children before April 30, 1999 and which of the parties should be entitled to custody of the children keeping in view their interest. He shall make the report after giving the parties an opportunity to lead evidence on the questions in issue. The parties for this purpose shall appear before the learned District Judge on December 10, 1999. The matter be again listed on May 22, 2000.

19. Till such time the matter is finally disposed of by us, the children need to be properly looked after and for this purpose an arrangement has to be worked out. We are conscious of the fact that the children need a home for their psychological and emotional development. A home where the parents not only feed them in physical terms but feed their soul with love and affection. Both the parents at one time or the other ran away with the children clandestinely, without Realizing that it was not good for the psychological growth of the children. A child cannot have a normal growth if he/she is deprived of the love and affection of either of the parents. We had called the children in our chamber and talked to them. We found that the children were deeply attached to their father. This is not to say that they were not attached to the mother. It will be cruel to a parent if he or she, as the case may be, is debarred from staying with the children at night thereby totally depriving him or her of the joy of residing with them by placing such a restriction of time. It will be equally cruel to the children if such a restriction is imposed.

20. In the circumstances, Therefore, pending the final decision in the matter, we would consider it appropriate to direct that four days in a week i.e. from Monday to Thursday the children will remain with the petitioner and for three days, Friday, Saturday and Sunday, they shall remain with their father. During vacations the children shall spend first half of the vacations with the petitioner and the second half with the third respondent. The petitioner and respondents No. 3 to 6 are interdicted from taking the children out of the territorial jurisdiction of this Court.

21. It is further directed that both the parents shall discharge their respective roles as caretakers in respect of their children, in accordance with the aforesaid

order, to the best of their ability and desist from poisoning the minds of the children towards each other. This order shall ensure till the matter is finally determined by this Court.