

(1993) 10 GUJ CK 0034

In the Gujarat High Court

Case No : Sp. Criminal Appeal No. 1488 of 1993

Sushilaben Dhulubhai Solanki

APPELLANT

Vs

Ramakant Dehyubhai Parmar and Others

RESPONDENT

Date of Decision : 18-10-1993

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1994) 2 DMC 288 : (1994) 2 GLR 1260

Hon'ble Judges : S.M. Soni, J;S.D. Shah, J

Bench : Division Bench

Advocate : M.S. Sharma, for the Appellant; B.S. Supneia, for the Respondent No. 1 and K.P. Raval, APP for the Respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

S.M. Soni, J.—Rule. Mr. Supheia, learned Advocate, waives service of rule for respondent No. 1. Mr. K.P. Raval, learned A.P.P., waives service of rule on behalf of respondents Nos. 2 and 3.

2. Real maternal aunt of minor Tarlika (minor for short) has moved this Court under Article 226 of the Constitution of India to issue a writ of Habeas Corpus against respondent No. 1, father of minor, and produce her before the Court, ascertain her wish as to with whom she is willing to reside i.e. with maternal aunt or with the petitioner, and on ascertaining her wish, necessary orders be passed.

3. It is necessary to refer to certain facts, which, in our opinion, are most relevant and material for the purpose of deciding this petition. Minor is the first child, aged about 16 years, of respondent No. 1. When minor was aged about four years, her mother had died. Minor had another younger sister named Priti. In view of the tender age of both the daughters, it appeared that the respondent No. 1 arrived at an arrangement with the petitioner, a real maternal aunt of the minors, to the effect that minor Tarlika will stay with the petitioner and minor

Priti shall stay with respondent No 1. Minor was brought up by the petitioner and there appeared no grievance about the welfare of the minor by the petitioner. However, it appears that there was some dispute about the property left by the deceased mother of the minors and some proceedings, may be for succession certificate, was initiated, which also appears to have been terminated by way of compromise. There, it appears that it was agreed that 1/3rd of the amount of the share of minor was to be invested in fixed deposit, to be payable on her attaining majority. On minor attaining majority, that amount is likely to be Rs. 51,000/- and odd. However, in the year 1991, respondent No. 1 filed Habeas Corpus petition, being Special Criminal Application No. 866 of 1991, in this Court for custody of minor from the present petitioner. Therefore, this Court Corams; O.N. Ray, C.J. and C.K. Thakkar, J. passed the following order :

"In the facts and circumstances of the case, we are of the opinion that ends of justice would be met if Tarlika, minor daughter of the petitioner, is allowed to take admission in Shri Vitthal Kanya Vidyalaya, Nadiad. We are informed by the learned Counsel for the petitioner that all formalities have been undergone and Tarlika has been admitted in the said school. The petitioner will take Tarlika to the said Vitthal Kanya Vidyalaya, Nadiad on Monday i.e. July 8, 1991. The learned Counsel for the petitioner further states that the petitioner will bear all the expenses and abide by the rules and regulations of the said school and hostel authorities. In these circumstances, nothing more requires to be done and accordingly, the petition stands disposed of. Opponent No. 1, who is in custody of Tarlika, is directed to hand over custody to the petitioner so as to enable him to get her admitted at Vitthal Kanya Vidyalaya, Nadiad".

In view of the order passed by the High Court in that petition, minor was required to be admitted in Shri vitthal Kanya Vidyalaya, Nadiad. It is alleged that she was admitted, but she did not behave properly and returned home within three days and then she was admitted to Ahmedabad school, where also she did not behave properly and created circumstances, which compelled the respondent No. 1 to shift his residence from Ahmedabad to Gandhinagar. After shifting at Gandhinagar, minor was admitted in Technical School at Gandhinagar. Minor thereafter wrote two letters dated 5.8.93 and 19.8.93 to the petitioner, complaining against the cruel and partial conduct of the respondent No. 1. Relying on the allegations made in those letters, the petitioner has filed the present petition. Those two letters are also annexed with the petition. From the said letters, it appears that the respondent No. 1 did not cooperate with the minor in prosecuting her studies. Respondent No. 1 did not provide her necessary material for studies. Respondent No. 1 did not treat minor equitably with other minor Priti, who was favoured in the aspect of food and household work and on making complaint about the same, minor was beaten and respondent No. 1 has behaved cruelly. It also appeared from the letters that respondent No. 1 was not interested in the education of the minor and an impression was created in the minor that she may not be permitted to appear in the examination and her career may be ruined. From the other facts stated in

the letters, it appears that she has written these letters with mature understanding and feelings for her own sister and the members of the family of the petitioner.

4. The petition is opposed by the respondent No. 1 on the ground that the petitioner has instigated the minor to defy her father, respdt. No. 1, in every respect. This is done with a view to get the property of minor, which is deposited in a fixed deposit in a Bank. It is also alleged that the petitioner and the members of the family had a very meagre income and it is not in the interest and welfare and well-being of the minor to stay with the petitioner. It is also alleged that the parties are Christian by religion and petitioner, though a Christian, is leaving with a Brahmin without marital tie and this amounts to a moral turpitude, which may reflect on the character of the minor. It is also alleged that the daughter of the petitioner is unmarried and is a Constable in the Police force, husband a petitioner is a part-time driver and the son of the petitioner is driving of the rickshaw. Respondent No. 1 is in Government employment and earns a handsome salary. It is also alleged that the petitioner is only exploiting the tender understanding and is abusing the immaturity of the minor by asouring ponder a sentiments and feelings. It is, therefore, alleged that the petition should be dismissed.

5. Undisputedly, the parties i.e., the petitioner, respondent No. 1 and the minor, are Christian by religion. The father, under every system of law is a natural guardian of a minor child. Thus, there is no dispute that respondent No. 1 is a natural guardian of minor. Section 19 of Guardians and Wards Act provides that nothing in Chapter It of the Act (Chapter II pertains to appointment and declaration of guardians) shall authorise the Court to appoint or declare a guardian.....,of the person..... (a)----(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the minor, or (c)---- Section 17 of the Guardians and Wards Act provides as to matters to be considered by the Court in appointing guardian. Thus, normally when the father of a minor is alive and is not unfit to be guardian of the person of minor in the opinion of the Court the question of appointment of guardian does not arise. Thus, in the instant case, though the father is alive and the minor is in the custody of the father, the question has arisen as to whether the petitioner be appointed as a guardian and the custody of the minor be handed over to her In general, parents are entrusted with the custody and education of their children yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with due education in literature and morals and religion and that they will be treated with kindness and affection. On such presumption, the custody of the minor is entrusted to the father, but is that presumption is removed in the circumstances of the case on being found that the father is guilty of gross ill-treatment or cruelty towards his infant children, or that he Acts otherwise in a manner injurious to the interest of the minor, the Court will interfere and deprive the father of the custody of his children and appoint a suitable person to act as guardian and take care of them and to

superintend their education. It can be said that by alleged misconduct of ill-treatment and cruelty towards minor or acting in a manner injurious to the interest of minor father has, by conduct, abdicated his paternal authority. It is known that the State is theoretically the guardian of all its minor subjects and the duty of appointing a guardian to protect the person and property of the minor is devolved on the Judge as the representative of the sovereign. An old writer has observed :

"The law protects their persons, their rights and estates, excuses their laches and assist them in their pleading; the Judges are their counsellors, the jury are their servant and the law is their guardian".

Thus, father's right to be guardian is not absolute. His fitness has to be considered, determined and weighed in terms of the welfare of the minor children. If father's custody cannot promote their welfare, then he cannot claim indefeasible right to their custody. Father's right to custody of minor as a natural guardian is not indefeasible, but is subordinate to child's welfare.

6. Thus, to decide whether the petitioner will be entitled to the custody of the minor, it will be necessary to decide if the father has become Unfit to be the guardian of the minor. In the instant case, it is clear from the following circumstances, which are on record and which emerged in the course of the hearing of this petition, that the father has proved himself unfit to be the guardian of the minor :

(1) Since the age of 4 years, minor was in the custody of the petitioner till she grew of about 14 years or so. In the year 1991, father took custody of the minor by the order of this Court. (Coram : G.N. Ray, C.J. and C.K. Thakkar J.). The order of this Court is very clear to the effect that minor was to reside in some hostel for the girls. The father did not obtain necessary direction from this Court when the minor acted, according to the father, improperly and was required to be removed from the said hostel at Nadiad to Ahmedabad. The allegations against the father in the two letters of 5.8.93 and 19.8.93 are not denied, but are tried to be explained away and, in our opinion, the explanation was not very convincing.

(2) On service of the notice of this petition, minor was brought to this Court by the father first with such clothes not befitting to a child of a Government employee, who earns a handsome salary. On enquiring about the same, the minor complained that her father did not allow her to put on proper and decent clothes, though she had such clothes with her, and this allegation was not denied by the father. This suggests the absence of love and affection for one's own child.

(3) At the first discussion, the respondent No. 1 had shown willingness to allow the custody of the minor with the petitioner and on his expressing such willingness, the custody of the minor was entrusted to the petitioner.

7. From the above facts, if we do not enter into other particulars, it is at least

clear that respondent No. 1-father is guilty of ill-treatment or cruelty towards the minor and that respondent No. 1 acts in a manner injurious to the interest of the minor, more particularly under he has taken over the responsibility to educate the minor and got custody under the order of this Court in 1991 before this, he has not been properly facilitating her and providing necessary material for prosecuting her studies. Thus, in our opinion, father, respondent No. 1, has not only misconducted in his duty as a guardian of the minor, but has become unfit in character and conduct as he has been guilty of cruelty and unfairness in behaviour with her.

8. It has been a settled law that the right of the father, as recognised by law, has to be kept in mind and give its due weight, but the primary and paramount consideration undoubtedly remains to be the welfare of the minor and in view of the facts stated above, the respondent No. 1-father has misconducted himself in discharge of his duty as a natural guardian of minor.

9. Question is when the father, as a guardian, has misconducted, will it be in the welfare of the minor to entrust her custody to the petitioner, particularly when allegations as to moral turpitude are alleged by the respondent No. 1 against the petitioner. In our opinion, the allegation as to moral turpitude does not stand or should not weigh before us for the simple reason that despite that fact, respondent No. 1 had handed over the custody of minor to the petitioner when she was aged 4 years. Secondly, the son and daughter of the petitioner had no complaint against their mother on that alleged aspect of her living with the present husband. Petitioner has admitted that she is married with Batukbhai Tapubhai Vyas on demye of her husband Philipbhai Christian and this marriage is accepted by her two children.

10. Sub-sections (2) and (3) of Section 17 of the Guardians and Wards Act provides for the matters to be considered by the Court in deciding what will be for the welfare of the minor and Sub-section (1) of Section 17 has made it clear that the first and paramount consideration in appointment of guardian is the welfare of the minor. Sub-sections (2) and (3) reads as uuder :--

"(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kind to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference".

Here, in the instant case, the minor is aged about 17 years and she is able to understand her interest properly. It also appears that she has some worldly knowledge and feelings about the family members. This transpires from the letters written by her. The minor is a girl, who, particularly at this age of about 17, really needs motherly love, closeness and friendship, with whom she can

disclose and talk frankly the physical changes in the body. If such child is not guided properly, may go astray. It appears that in the instant case, there are some allegations by the father about the conduct and character of the minor, but our discussion with her only reveals that the same was possibly the outcome of her being deprived of the motherly love and affection and unjust and unfair treatment given to her by her father. The fact that the father has recently remarried is also a circumstance, which, in our opinion, had worked against the interest of the minor. The element of being unfair to her has also driven away her mentally from her father. Certain allegations of cruelty made by minor before us, by way of punishment on her having committed some mistakes, compels us to take out her from the custody of her father. This is all against the welfare of the minor.

11. Against these circumstances, father has alleged that it will not be in the welfare of the minor to entrust the custody to the petitioner. The allegation is that petitioner is not financially sound. The petitioner, her husband and her son have specifically stated before this Court that they are ready and willing to bear the expenses of the minor not only till she completes the age of minority but till she stays with us. Against this undertaking, the father-respondent No. 1 has on the contrary come out with the say that if the petitioner is ready to take the custody of the minor, he should not be saddled with the liability of maintenance for the period till the minor grows major. In our opinion, this is one of the circumstances speaking against the father to allow him to retain the custody of the minor. In our opinion, however child be bad or if it is found that it is in the interest and welfare and well being of the child to remain with someone else, then also the father will look forward to the interest of the child and volunteer himself or the maintenance of the minor, despite being deprived of the custody. Welfare cannot and should not be measured in money only or by physical comfort alone. It has many facets, such as financial, educational, physical moral and religious. The test, in our opinion, would be that a wise parent ought to have considered for the well being of the minor. Due regard must also be had to the ties of affection and the capacity for building up a good career for the infant. In the present case, the tie of affection is broken with the respondent No. 1, but is still alive with the petitioner. In view of the income of the husband of the petitioner, son of the petitioner and the daughter of the petitioner and their readiness and willingness and preparedness to accept the custody of the minor, they stand financially more sound than respondent No. 1. Minor belongs to a middle class family and it appears that the petitioner will be able to provide all the facilities to be provided to a minor of a middle class. We also enquired and ascertained that there is sufficient residential accommodation with the petitioner, where minor can stay and prosecute her studies. According to the minor, the atmosphere and environment at the house of the petitioner is encouraging and healthy while the atmosphere at the house of the respondent No. 1 is unhealthy and discouraging. Taking into consideration all these circumstances, the question of building character of the minor chances of exploiting ability of the minor,

physical and mental growth of the minor and the atmosphere and environment for the development of the personality of the minor, we are of the opinion that it is in the interest of the minor that her custody is given to the petitioner. The minor has all the chances of her being more happy and comfortable in the custody of the petitioner who had means and resources to help her in carving out a nice future of hers.

12. In view of these facts, we are of the opinion that the petitioner should be entrusted with the custody of the minor Tarlika and appointed as the guardian of the person of Tarlika. We, therefore, direct that the custody of minor Tarlika to remain with the petitioner. We also make it clear that petitioner shall not be entitled to claim past, present or future maintenance of Tarlika. We also direct the Indian Bank, Piplag Branch not to pay the amount of Rs. 28000/- with accrued interest lying with them in fixed deposit in the name of minor Tarlika without the orders of this Court. The petition is accordingly allowed. Rule made in absolute.