

RESERVED

A.F.R.

Court No. - 74

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Case :- HABEAS CORPUS WRIT PETITION No. - 1217 of 2019

Petitioner :- Gyanmati Kushwaha And Another

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Azad Khan, Mohini Jaiswal

**Counsel for Respondent :- G.A., Ali Hasan, Fakhruzzaman, Om
Prakash, Fakhra Uz Jama**

Hon'ble J.J. Munir, J.

1. This petition for a writ of habeas corpus has been instituted by the first petitioner, Gyanmati Kushwaha, asking that her minor daughter, Drisha Kushwaha, aged about two years, be ordered to be produced before this Court from the custody of respondent no. 5, Kamal Kushwaha, and emancipated therefrom in the manner that she be entrusted into the care and custody of the first petitioner, her mother.

2. Pending admission, by an order dated 12.02.2020, Suresh Kushwaha was ordered to be impleaded as respondent no. 6, inasmuch as it transpired from an order passed by the City Magistrate dated 20.11.2019 that the minor, Drisha, petitioner no. 2 was in the former's custody, who is Drisha's grandfather (paternal). He was, accordingly, impleaded as respondent no. 6.

3. This petition was admitted to hearing *vide* order dated 24.09.2020, and a *rule nisi* was issued, ordering Drisha Kushwaha, the minor, to be produced on 08.10.2020. On the date of return, a counter affidavit was filed on behalf of respondent no. 6, to which a rejoinder affidavit was filed too, in Court. On that day, Drisha's mother, Gyanmati Kushwaha, the first petitioner, her grandfather Suresh Kushwaha, the sixth respondent,

and her father's maternal uncle Kamal Kushwaha, the fifth respondent were present. The matter was heard at length. The hearing was adjourned to 15.10.2020. It was further heard on 15.10.2020, with Smt. Gyanmati Kushwaha and Suresh Kushwaha being in attendance. On the said date, judgment was reserved, with a direction that Gyanmati Kushwaha and Suresh Kushwaha will appear on the date fixed for delivery of judgment, to be intimated by the Registry.

4. The facts that appear from the record are that the first petitioner, Gyanmati Kushwaha and the late Krishna Kushwaha, son of Suresh Kushwaha, were married, according to Hindu rites, on 11.11.2011 at Shree Durga Bhavani Seva Mandal, Shivaji Nagar, B.M.C. Colony, Bandra East, Mumbai. This marriage was according to the wishes of the husband and wife, and as it appears, did not have origins in the blessings of the couple's families. Later on, Smt. Gyanmati Kushwaha and her late husband, Krishna Kushwaha, appear to have persuaded their respective families to bless the couple, which followed a marriage in right earnest being solemnized all over again on 26.11.2012. There is a photostat copy of the invitation card relating to that marriage on record, which no one has disputed before this Court. In course of time, a daughter was born to the parties, who came to be named Drisha. She was born on 28.05.2017. It is about her custody that the mother and her grandfather, Suresh Kushwaha, are engaged in a strife.

5. To revert some paces in time, in the sequential narration of events, it is Gyanmati's case that she, her husband Krishna Kushwaha and her daughter Drisha were domiciled in Mumbai. Gyanmati's husband Krishna Kushwaha had come away to his native place at Jhansi on 11.05.2018, while Gyanmati stayed back in Mumbai. She received a call from Kamal Kushwaha, her husband's maternal uncle, on 13.05.2018, that some unknown offenders had done Krishna to death. Kamal Kushwaha asked

Gyanmati Kushwaha to come over to Jhansi along with her daughter. She immediately proceeded to Jhansi along with Drisha. Once there, she met Kamal Kushwaha. Kamal took along Gyanmati to the police station, where she was surprised to know that she had been implicated in her husband's murder, as she says at the instance of Kamal, and was arrested. Gyanmati Kushwaha was remanded to judicial custody on 16.05.2018, and at that time, Kamal snatched away Drisha from her. It is said that at that time, Drisha had not yet been weaned away, but still, Gyanmati was deprived her daughter's care and custody, while in jail. Gyanmati Kushwaha applied for bail and was released from prison on 10.09.2018. The parties are *ad idem* that Gyanmati Kushwaha is currently facing trial as a co-accused in the case relating to her husband's murder. After her release on bail, Gyanmati Kushwaha asked Kamal Kushwaha that she may be handed back her daughter's custody, but he refused. It is said that she is a native of Mumbai, and did not know anybody at Jhansi. Therefore, she returned to Mumbai on 30.09.2018. She came back to Jhansi on 05.01.2019 once again and requested Kamal Kushwaha to hand over her minor daughter back. Kamal Kushwaha did not allow Gyanmati Kushwaha to meet Drisha. He told Gyanmati Kushwaha that her in-laws had shifted to Mumbai and taken away Drisha with them. Once again, Gyanmati came to Jhansi to meet her lawyer in connection with the criminal case pending against her in the District Court at Jhansi. She reiterated her request to Kamal Kushwaha that her daughter may be handed back to her. The request was again refused. Gyanmati Kushwaha then filed an application to the District Magistrate on 21.08.2019 under Section 97 of the Code of Criminal Procedure, 1973¹, with a case that her daughter was in illegal confinement of Kamal Kushwaha, and that the minor may be emancipated therefrom and handed back to her. No action was taken on this application. The petitioner then moved a habeas corpus writ petition before this Court, being Habeas Corpus Writ Petition No.

¹ for short " Code"

922 of 2019, which was disposed of directing the District Magistrate to pass appropriate orders on the pending application made by Gyanmati Kushwaha under Section 97 of the Code, within two weeks of receipt of a certified copy of the order made by the Court. The District Magistrate, in passing that order, laid his hands off the matter, in view of the fact that on 18.08.2018, the Chief Judicial Magistrate had entrusted Drisha's custody to Suresh Kushwaha, respondent no. 6, on an undertaking that the latter would look after the child's welfare. That order appears to have been passed in connection with Crime No. 263 of 2018, under Section 302 of the Indian Penal Code, 1860, Police Station - Kotwali, District - Jhansi, relating to Krishna Kushwaha's murder.

6. Faced with this deprivation of her minor daughter's custody, Gyanmati Kushwaha has petitioned this Court, where the course of proceedings, so far taken, have been delineated above.

7. Heard Ms. Mohini Jaiswal, learned counsel for the petitioners, Mr. Vishal Agarwal, Advocate holding brief of Mr. Fakhruzzaman, learned counsel appearing on behalf of respondent no. 6, Mr. Om Prakash, learned counsel appearing on behalf of respondent no. 5, and Mr. Jhamman Ram, learned A.G.A. appearing on behalf of the State.

8. It is submitted on behalf of Gyanmati Kushwaha that she is Drisha's mother, and the only surviving natural guardian, after her husband Krishna Kushwaha's death. She is entitled to Drisha's custody. It is submitted by Ms. Jaiswal on behalf of Gyanmati Kushwaha that the provisions of Section 6(a) of The Hindu Minority and Guardianship Act, 1956² are of particular relevance. She emphasizes that under the proviso to Section 6(a), the mother has the right to the custody of a minor child until the age of five years ordinarily, which is quite apart of her right to the minor's natural guardianship. It is said that pitted against the minor's

² for short "the Act of 1956"

father, in cases where the minor is below five years of age, the mother would have a preference in the matter of custody over the father also. Here, Suresh Kushwaha is Drisha's grandfather. It is absolutely not in the minor's welfare to entrust her custody to the grandfather, while the mother is around. There is no one better than the mother to look after the custody of a child, particularly, a young child.

9. Mr. Vishal Agarwal, Mr. Om Prakash and Mr. Jhamman Ram, on the other hand, have argued in one voice to say that the general rule postulated under the proviso to Section 6(a) of the Act of 1956, and elsewhere too, about the mother's right to a young child's custody would not be applicable here. They submit that in this case, the mother would not be entitled to Drisha's custody, because she is an accused in the case relating to her husband's murder, along with co-accused Ajay, who has been dubbed as her paramour, and other associates. She has been assigned the role of conspiracy in the crime, and charge-sheeted. She is facing trial for her husband's murder, and if convicted, the child's life might be ruined. An apprehension has also been expressed that the child's life may be in jeopardy, if the allegations about her involvement in conspiracy with Ajay to murder her husband were true. Mr. Agarwal has also raised an issue about territorial jurisdiction. He submits that the fact that the child is residing in Mumbai with the sixth respondent, there is no territorial jurisdiction with this Court to entertain this petition for a writ of habeas corpus.

10. This Court has keenly considered the rival submissions and perused the record. So far as the submissions regarding the territorial jurisdiction of this Court is concerned, there is *ex-facie* no force in the same. It is common ground between parties that Gyanmati was deprived of Drisha's custody, when she was remanded to judicial custody, post arrest at Jhansi. The minor was taken away at Jhansi by Kamal Kushwaha, respondent no.

5, her deceased husband's maternal uncle. It was at Jhansi that under the orders of the Chief Judicial Magistrate, the minor's custody was entrusted to respondent no. 6, the minor's grandfather. Therefore, there are clear facts which give rise to a cause of action at Jhansi, within the territorial jurisdiction of this Court. The submission to the contrary, advanced by Mr. Agarwal is, accordingly, rejected.

11. Now, this brings the Court face to face with a situation indeed perplexing. The law would not certainly countenance custody of a minor to be handed over to a parent who is an undertrial, in connection with the other's murder, and that too, on a charge of conspiracy with a paramour. On the other hand, it is the mother's right to her child's care and custody, and the child's right, in turn, to her mother's love and affection, which the law takes care of to the extent that if the mother were in jail in an unrelated matter, young children up to the age of five or six years, depending on different jail rules in the various states, are allowed to stay in prison with the incarcerated mother. If one were to look at the authority in India and the world over, there is striking similarity about one principle, that in custody matters, it is the welfare of the child that is of paramount consideration. The statutes may speak about the right of one parent or the other to custody, or the right of guardianship, but, in substance, it is not at all about the right of a guardian to the minor's custody, or guardianship; it is all about the minor's welfare. Section 6(a) of the Act of 1956, read with its proviso, is also a principle founded on the wisdom of humanity transcending generations, that a young child can be best looked after by her/his mother. So far as the principles about the minor's welfare are concerned, these find eloquent statement in the provisions of Section 17 of The Guardians and Wards Act, 1890³. The principle that the minor's welfare is best secured in the mother's hands

³ for short "the Act of 1890"

and is to be departed from for very strong reasons, is enunciated by the Supreme Court in **Roxann Sharma v. Arun Sharma**⁴ thus :

.....There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons.

12. It must be remarked here that the holding of their Lordships in **Roxann Sharma (supra)** acknowledges the overbearing principle that for a young child, the mother is best suited to be entrusted with her/his custody, but, at the same time, the remarks in **Roxann Sharma** do indicate that for strong reasons, the rule can be departed from. Once it is the minor's welfare that is of paramount consideration, the particular circumstances affecting parties, their behaviour etc. may tip the scales to the other side. No doubt, to depart from the rule, based on a very innate facet of human experience, in the care and welfare of their young ones, there must be very strong reasons. The Supreme Court particularly considered the impact of one of the parents being involved in the death of the other spouse *vis-à-vis* the question of the minor's welfare in **Nil Ratan Kundu and Another v. Abhijit Kundu**⁵, wherein it was held thus :

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh) *absconded* and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable

4 (2015) 8 SCC 318

5 (2008) 9 SCC 413

under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In *Kirtikumar* [(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

13. There are some very pertinent remarks in **Nil Ratan Kundu** (*supra*) about the principles governing custody of minor children, which must be referred to. It has been observed in **Nil Ratan Kundu** thus :

Principles governing custody of minor children

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

14. In the present case, the Court is deprived of knowing the wishes of the minor, because she is too young to express her intelligent choice. The minor's choice has been underscored by their Lordships in **Nil Ratan Kundu** and also in the provisions of Section 17(3) of the Act of 1890, but that can have no application in the present case, where the minor is a very young child, presently aged about three years and a half. It is the circumstances and the facts on record that alone can serve as a guide in the foreshadow of settled principles about the minor's welfare to decide the question of her custody. It is not known to this Court as to what are the circumstances appearing against the mother, on the basis of which she has been charged with conspiracy in her husband's murder. This Court ought not to investigate those circumstances also, that are the concern of the court where she is facing trial, but, as matters stand, she is an accused in a case relating to her husband's murder. The fact that she is an accused is not in doubt. One consequence of this fact is that she faces a situation where she could be convicted, though the presumption of innocence is all along with her. If she were to be convicted, the minor's welfare would be thrown into disarray. It would be irreversibly unsettling and debilitating in her formative years. It may even expose her to insurmountable trauma, if she witnesses her mother, whom she is bonded with, convicted in the case of her father's murder.

15. This Court assumes that the possibility of conviction may be remote or not so remote, but the possibility is there. The existence of this possibility and the adverse impact of the event, if it were to come to pass, would far outweigh the transitory benefit the minor would derive from her mother's care and company. This facet of the matter apart, the possibility that the mother might truly be a conspirator in her husband's murder, predicates a personality which would not be beneficial for the minor in grooming her about her moral values - a very important aspect of a child's welfare. On the other hand, if the mother is innocent and she is acquitted,

the loss, the minor would suffer on account of deprivation of her mother's care and custody, cannot be re-compensated, but nevertheless, it is a reverse that must be accepted for the minor's surer welfare, in preference to a contingent better, fraught with risk.

16. It is made clear that in the event the mother is acquitted by judgment based on doubt or otherwise, she would have the right to move a court of competent jurisdiction for her daughter's custody, which would then be decided in accordance with law.

17. Subject to what has been said above, this Court does not find any good ground to make the rule absolute. It is, accordingly, discharged.

18. In the result, this petition **fails** and stands **dismissed**.

Order Date :- February the 26th, 2021

I. Batabyal