

Gopal Ji And Ors. vs Shree Chand And Anr. on 9 June, 1954

Equivalent citations: AIR1955ALL28, 1955CRILJ24, AIR 1955 ALLAHABAD 28

JUDGMENT

Mukerji, J.

1. This is an application by three persons, Gopal Ji, Laxmi Devi and Radha Krishna, under Section 491, Criminal P. C., as also under Article 226 of the Constitution of India. Article 226 has apparently been added because the prayer which has been made is a prayer that is generally made in applications for 'habeas corpus'. The prayer is that a writ of 'habeas corpus' be issued to set at liberty Gopal Ji and Laxmi Devi, applicants Nos. 1 and 2, from illegal detention and illegal custody of the opposite parties.

2. The allegations on which this application was founded were that Gopal Ji and Laxmi Devi are two minor children of applicant No. 3, Radha Krishna. Gopal Ji is a boy of about six years, while Laxmi Devi is a little girl of about two years of age. The mother of these two minor children suddenly died of cholera on 2-11-1953 at the Colvin Hospital, and that Shri Chand and Kamta Prasad, the opposite parties, thereafter took away the two minor children to their house, that the opposite parties have refused to send back the children to their father and they are demanding a sum of Rs. 500/- as a kind of ransom for sending back these children.

In the affidavit it was alleged that the children were in danger of harm, and that if they were not forthwith released from the custody of the opposite parties then there was grave danger to their life. It may be here stated that in the affidavit of the petitioner no mention was made as to there being any relationship between Srichand and Kamta Prasad on the one hand and the three petitioners on the other. From the affidavit and the petition it appeared as though the opposite parties were total strangers, and that they were detaining the two minor children in order to make unlawful gain out of their detention.

3. Notices were issued to the opposite parties to show cause, and in answer to that notice the opposite parties have shown cause and have also produced the two minor children in Court today in order to receive final orders in regard to their custody from us.

4. The counter-affidavit filed by Kamta Prasad on behalf of the opposite parties discloses that Kamta Prasad is the Mause (a kind of maternal uncle) of the two minors, and opposite party Srichand is the maternal uncle of the minors. From the counter-affidavit it is clear that when Gayatri Devi, the mother of the two minors, was taken seriously ill on 22-11-1953, then her sister, that is to say, Kamta Prasad's wife, rushed to see her. While this lady was in the company of the very ill Gayatri Devi, she told her that she was dying and she wanted her to look after her little children in the event of her

death. Gayatri Devi died in hospital the same night as she had an attack of virulent cholera and the children were, according to the allegations in the affidavit, removed the same night to the house of Kamta Prasad by his wife who was the maternal aunt of the minor children.

It is beyond controversy that from that time onwards the children have been in the custody of these maternal relations of theirs. The period of their stay with these relations has been seven months--this application having been made on 21-5-1954. The fact that such a long time lapsed or was permitted to lapse between the period of the removal of the children and the petition being made to this Court for their custody or their recovery back, indicates to us that the petition was made not because the detention of the children was illegal, at any rate, in the point of view of the petitioner, from its inception, or that there was any danger, to begin with, to the lives of the children if they remained in the custody of the opposite parties. We have a feeling that this petition has been made for other reasons than those disclosed to us in the affidavit filed on behalf of the petitioner.

5. We examined Gopalji, the little boy of six years, and we were impressed by the intelligent manner in which he understood our questions and replied to them. He was perfectly at ease when we talked to him, and from our conversation with him it was clear to us that he would be most unhappy if we direct his removal from where he is at the present moment to the custody of the father. He even alleged that his father unnecessarily beat him. We may mention that on behalf of the opposite parties there was no such allegation in the counter-affidavit so that it could not be said that the little child had been coached to say this in order to support an allegation made on behalf of the opposite parties.

We have been unable to believe the allegation made in the affidavit of the petitioner that there was any demand of ransom by the opposite parties. We are also unable to believe that there is any danger to the lives of the minors if they remain in the custody of the opposite parties. We are on the other hand satisfied that the children are quite happy where they are. It may be pointed out that the children are, strictly speaking, not in the custody of either Srichand or Kamta Prasad, but they are in the custody of Kamta Prasad's wife who is not an opposite party to these proceedings but who has been looking after the children as any mother can look after any children. In the counter-affidavit it has been averred that Kamta Prasad has no children, and that he and his wife have been very fond of these children ever since their birth. This allegation to us appears to be true.

6. As we pointed out earlier, the children came into the custody of Kamta Prasad's wife not illegally but they came into her custody because their dying mother made a request to Kamta Prasad's wife to look after these children if she were to die. It appears to us that Kamta Prasad's wife has been honouring that sentiment and, possibly, that pledge that she gave to her dying sister.

7. It was contended on behalf of the applicant that the father who has made this application was the natural and the legal guardian of the two minors, and that he cannot be defeated in the matter of the guardianship of his own children by their maternal relations. As a bald proposition of law we do not dispute it. But the question that we have to consider in this application is not, as to the right of the father--his preferential right-- to the guardianship of these two minor children, but the father's right in these proceedings to obtain the custody of the two minor children. It will be noticed that under

Section 491, Criminal P. C., this Court is not bound to act: the relief which this Court grants is a discretionary relief, and the discretion which this Court is enjoined to exercise is only when this Court thinks it fit to exercise such a discretion. In the case of -- 'Sultan Singh v. Maya Ram Radha Swami', AIR 1930 All 260 (A), Dalai J. held that Section 491(I)(b) gave this Court power to act only when it thought fit to direct that a person illegally or improperly detained in public or private, custody within the limits of its appellate criminal jurisdiction be set at liberty. It was pointed out that in the very nature of things the power would be exercised in cases of urgency, where, for instance, the father is suddenly deprived of the custody of his children and there is danger to the life of the children in the transferred custody.

The equivalent writ of 'habeas corpus' was used as a high prerogative writ in England in appropriate cases to restore minors to proper custody when they were in illegal detention. The writ was never utilized or used for purposes of merely determining the rival claims of competing guardians: that claim has to be determined under the appropriate law, namely under the Guardians and Wards Act. In-- 'Mt. Haidari Begum v. Jawad Ali', AIR 1935 All 55 (B), Bennet J. under similar circumstances held:

"That the power under Section 491, Criminal P. C. is a general power of the nature of a 'habeas corpus'. The power under the Guardians and Wards Act is a power under a Special Act dealing with a special subject, that is, the subject of minors."

He further took the view, and in our opinion rightly, that where there was a special Act dealing with a special subject, resort should be had to that Act instead of to a general provision which was exercisable or which was available under extraordinary circumstances only.

8. On behalf of the applicants reliance was placed on certain cases which held that where a legal guardian or a "preferential" guardian, at law, makes an application for the custody of children who are in the custody of people who have no such right, then action can be taken under Section 491, Criminal P. C., and the children can be restored to the guardianship or custody of the preferential guardian. We have no doubt that in appropriate cases this can be done and should be done. The question which has to be seen in every case is whether on the facts and circumstances of that particular case action was called for under Section 491, Criminal P. C., or not. The cases which were cited to us were cases where there was nothing to indicate that an order in favour of the legal guardian was not called for under the circumstances of those cases, or there was anything in the circumstances of those cases on which the Court could have justly refused to act under the provisions of Section 491, Criminal P. C. In the case of -- "Venkataramaniah Chetty v. Pappamah", AIR 1948 Mad 103 (C), Rajamannar J. passed a conditional order in regard to the custody of a married girl who was below the age of thirteen years. Although Rajamannar J. held that the custody of the girl by the opposite party was not lawful when the question was raised in comparison with the custody which was sought by the applicant--husband, yet The held that the husband was not to have the custody of his minor wife, but that she was to be put in an institution for a period of one year and that the husband was to incur the expenses of such stay, so that the girl may be of age when there could be a proper and timely consummation of marriage. This order was made because it was contended by the opposite party that she was being kept away from the husband for the fear that if

she went to his house the husband would prematurely consummate the marriage.

As we have stated earlier, we do not dispute the proposition that it is possible for a legal guardian to initiate proceedings by a petition of 'habeas corpus' to recover the custody of minors if those minors are in illegal custody or if the minors are being detained in custody which would be detrimental to the interest of the minors. We are of the opinion that in determining whether or not relief was to be granted to a petitioner, the paramount consideration should be the welfare of the minors: We are of the opinion that if, on the circumstances of any particular case, it appears to the Court that the paramount interest of the minors do not demand that action be taken, then it is open to the Court to refuse the prayer.

This is what we have felt in the present case, namely, that we are satisfied that it is not in the best interest of the minors that we should give any relief to the petitioner. We should further point out that in this case, on the allegations made in the counter-affidavit, there would be no female in house of the petitioning father who could take care of the infant girl Laxmi Devi. The father has an old mother who sometimes stays with him but she though she was present in Court and watched these proceedings, gave no undertaking to us that she was prepared to accept the responsibility of looking after and caring for the minors.

9. Learned counsel for the petitioners wanted us to say that the observations which we have made in this judgment of ours should not be taken to prejudice the case of the father in the event of the father initiating appropriate proceedings under the Guardians and Wards Act. Left to ourselves, we would have thought it unnecessary to make any such observation but as learned counsel has specifically requested us to say so, we do state that our observations made in these proceedings should not be used to prejudice the decision of any proceedings that may be initiated under the Guardians and Wards Act hereafter.

10. For the reasons given above, we dismiss this application, but under the circumstances of this case we make no orders as to the costs of this petition.