

Shyama Charan vs State on 12 May, 1954

Equivalent citations: AIR1955ALL81, 1955CRILJ261, AIR 1955 ALLAHABAD 81

Author: Raghubar Dayal

Bench: Raghubar Dayal

ORDER

Raghubar Dayal, J.

A child about 2 1/2 months old was found abandoned in the compound of the seed stores at Basti on the 19-5-1953. Shyama Charan getting information about the presence of the child there from one Shrimati Dhanpatia took charge of the child and took it to the police station where he reported the matter. The police then made over the child to Shyama Charan's custody.

2. On 20-5-1953, Jagannath applied to the Magistrate praying that the child be given to his custody, he having no child of his own. After getting a report from the police, the Magistrate ordered on 1-6-1953, that the child be given to Jagannath and the child was actually made over to Jagannath on 9-6-1953.

3. Thereafter Shyama Charan applied to the City Magistrate praying for the recall of the order expressing his failure to understand the law under which the order for the delivery of the child to Jagannath was passed and also the fact that a minor's custody is governed by the provisions of the Guardians and Wards Act.

On this application the Magistrate ordered that as the child was given to the applicant i.e., Shyama Charan by the police for a temporary period and in view of his order dated 1-6-1953, Shyama Charan had no claim. He accordingly rejected the application.

4. Shyama Charan then filed a revision before the Sessions Judge of Basti on 10-6-1953. The learned Sessions Judge has made this reference to this Court recommending that the order of the Magistrate for the delivery of the child to Jagannath be set aside and the child be ordered to be restored to the custody of Shyama Charan.

5. The City Magistrate in his explanation to the Sessions Judge stated that he had passed the order complained of in his executive capacity and not as a Court. The learned Sessions Judge was of the opinion that the order of the Magistrate was passed under Section 523, Criminal P. C. I do not agree

with the view of the learned Sessions Judge. Section 523, Criminal P. C. deals with property seized by a police under Section 51, Criminal P. C., or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence. The property contemplated by this section seems to consist of material objects and not human being. It is very fairly conceded for the applicant Shyama Charan, that nobody would refer to a human being as property.

It is, however, contended for him that some sort of control is exercised over certain kinds of human beings, e. g., lunatics or children who are unable to take care of themselves. To have the power of control over another is not equivalent to possessing a right of ownership over others and to treat the other persons less favourably situated as their property. I have not been able to lay hands on the case quoted in Chitaley's Criminal Procedure Code under Section 517. The reference is -- 'In re Howka Ramalakshmi, 1 Weir 348 (A)' The reference says:

"But children are not property and the Court cannot, under this section, pass orders regarding the custody of children."

It is, therefore, clear that the order passed by the Magistrate is not an order passed in the exercise of his powers under Section 523, Criminal P. C. It is contended for the applicant that the order though not strictly coming under Section 523, Criminal P. C., purports to be an order under that section. There is nothing in the various orders of the Magistrate to indicate that he purported to exercise his powers under Section 523, Criminal P. C. It was also contended that an executive order of a Magistrate would be only such an order which is justified under any other law and as there is no law which authorises a Magistrate to pass an order like the one complained of, the order could not be an executive order and it being an order passed by a Magistrate in his capacity as a Magistrate it must be deemed to be an order passed by a criminal Court and, therefore, subject to the revisional powers of this Court.

It is true that for the validity of any executive order the authority passing the order must derive authority from some law but it does not necessarily follow that if an order is passed which is not justified by any law authorising the Magistrate to pass an executive order, such an order must be an order passed by the Magistrate in a judicial proceeding and, therefore, as a Court. I have not found any particular reference which would lay down as a duty of the police or of the Magistrate to deal with cases of children found abandoned.

As persons in charge of law and order, I should presume that they will have to take upon themselves the care of such persons. It must be, in view of such an implied right, a duty of these public servants that the Government passed orders which are contained in paragraphs 62 and 63 of the Manual of Orders of Government. These paragraphs are:

P. 62 "Foundlings and the friendless children of female prisoners should be made over to some orphanage when they attain the age of two years"

P. 63 "In the case of foundlings of less than two years of age District Magistrate should make the best possible arrangements for their care, and meet the expenditure, should any be necessary, from their contract grants. Any child whose maintenance has been so arranged for can, if necessary, after it attains the age of two years, be brought under the rule in the foregoing paragraph."

It is clear from these orders that foundlings are to be cared for by the District Magistrate and in respect of foundlings of less than two years, District Magistrates are required to make the best possible arrangement for their care and can meet the expenditure, if necessary, from the contract grant.

It would, therefore, appear that the Magistrate's order with respect to the custody of the child was not absolutely without any jurisdiction or power vested in him. As a Magistrate he had to make suitable orders for the custody of the child. Such an order will undoubtedly be an order made by him in his executive capacity and not as a Court or Magistrate.

6. Learned counsel for Shyama Charan has urged that these paragraphs of the Manual of Government Orders deal with foundlings found by the police and not those found by other persons. I see no good reason to restrict the application of these paragraphs to the foundlings found by police alone and not to apply to the foundlings found by other persons. Of course, when a foundling is found by any other person and that person is prepared to take charge of that child, the Magistrate will ordinarily, in the absence of any compelling reason, place the child in that person's custody. It was so done by the police in this case as well.

7. It has also been urged that Shyama Charan heard of the child and taking the first step of informing the police got some right over the child as a 'de facto' guardian and that in the exercise of that right he could get custody of the child till such time that the child's parent's are found and are prepared to take charge of the child. I need not express any opinion on this point. If there are any such rights in Shyama Charan he can have recourse to proper remedy.

8. The fact that the City Magistrate passed orders as an executive officer makes the order not subject to the revisional jurisdiction of this Court and that should mean the end of this reference. Further, when Shyama Charan himself took charge of the child from the police with an undertaking to produce it when required, it is not open to him, in my opinion, to object to the order of the Magistrate at this stage. He has to comply with that undertaking.

9. In view of the above, I reject the reference.