

Sanju and Others Vs. Sobhanath and Others

Sanju and Others Vs. Sobhanath and Others

SooperKanoon Citation : sooperkanoon.com/450094

Court : Allahabad

Decided On : Aug-11-1994

Reported in : AIR1995All90; II(1994)DMC616

Judge : S.N. Saxena, J.

Acts : [Constitution of India](#) - Article 226; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6

Appeal No. : Habeas Corpus Writ Petn. No. 21335 of 1994

Appellant : Sanju and Others

Respondent : Sobhanath and Others

Advocate for Def. : Standing Counsel and Ashok Kumar, Adv.

Advocate for Pet/Ap. : C.K. Parekh, Adv.

Judgement :

ORDER

1. The detenus who are children of Smt. Parvati Devi and Sobhanath, O.P.No. 1, have instituted this Habeas Corpus Petition through their mother, Smt. Parvati Devi, as they allegedly were in the illegal custody of their father and considering the status of husband and wife they could be maintained properly by their mother only and not father.

2. The marriage had taken place about 20 years ago and on the date of the petition, i.e. 7th July, 1994, Raju Radha and Sanju were aged about 11 years, 5 years and 4 years respectively. Relations between the wife and husband became strained allegedly due to the bad habits of the husband who was a labourer. The alleged bad habits were illicit connection with another lady, gambling and drinking etc. His behaviour towards the wife and children had become rather cruel. 3. Petitioner No. 4, the wife, was compelled to do the work of washing and pressing of clothes for her survival as well as the survival of the children. On her request, her husband had taken the family to Kikarahi Bazar within police station Karma where she had started a petty shop of 'Visatkhana' and also used to do the work of washing and pressing of the clothes of the customers. Her husband, however, about four years ago with the help of his notorious friends, illegally took away the children to Gujarat along with some unknown person. They were being ill-treated by him there. She tried her best to get back the custody of the children but in vain and hence the need for this Habeas Corpus Petition. She had lodged a first information report also on 4-7-1994 against her husband, the copy of which is Annexure 1 of the petition.

4. Husband Sobhanath in his counter affidavit contended that his wife, Smt. Parvali Devi was a lady of easy virtues and had developed illicit relationship with one Surendra Singh who was a carpet merchant. She had started living openly with Surendra Singh. He denied that he had got any bad habit and contended that he wanted her to accompany him to Surat but she was not prepared for the same due to her illicit relationship with Surendra Singh. Regarding children, he stated that they were living happily along with him in Surat. Being father, he was the natural guardian of the children all of whom were more than five years of age. There was danger of the children getting spoiled if they lived along with his wife in the house of Surendra Singh. He had got sufficient means to maintain the children and the Habeas Corpus Petition was liable to be dismissed.

5. Petitioner No. 4 filed rejoinder affidavit which she reasserted her contentions. She further alleged that the children were minors and unable to take a correct decision regarding their welfare. The paramount consideration was welfare of minors and not the legal right of anybody.

6. The submissions put forward by the learned counsel for the parties were heard at length by this court. It was now settled law that even in the presence of an alternative remedy, a writ of Habeas Corpus regarding the custody of the children was maintainable and this petition therefore could not be thrown away on the alleged ground of its non-maintainability- vide this Court's decision reported in 1993 ALJ 714: (AIR 1993 All 230), Ravi Kant Keshri v. Krishna Kumar Gupta. The aforesaid view regarding the maintainability of this petition was taken by the court after considering a few decisions of this Court as well as the apex Court. This Court held that alternative remedy under Hindu Minority and Guardianship Act is no bar against the maintainability of the Habeas Corpus Petition. It is, therefore, not possible to agree with the contention of the learned counsel for the opposite party that the petition is not maintainable.

7. Sobhanath, the father, claimed right of custody of the children in view of Section 6 of the Hindu Minority and Guardianship Act 1956 as he was their natural guardian and also because the children could be better maintained by him than his wife and that considering the welfare of the children which was of paramount consideration, this petition was liable to be dismissed because his wife had got no source of income. For the petitioner, to the contrary, it was contended that she had been running a small shop and also washing and pressing clothes of customers and compared with the resources of her husband, she was in a better position to maintain the children.

8. After carefully considering the aforesaid submissions and going through the record, I find that the contention of Smt. Parvati Devi that she was in a better position to maintain the children was devoid of merits. She used to live in a village and it was difficult to believe that she would have been able to earn enough money for her own living and also the living of the three children. It was evident from her own affidavit and rejoinder affidavit that the children were being maintained by her husband Sobhanath in Surat for the last about four years. Sobhanath, no doubt, was a labourer only but being an able bodied man, he was in a position to earn more money and provide better living conditions and also education to the children. Parvati Devi's claim therefore, that she could better ensure the welfare of the children was not acceptable.

9. The three children were present in the court room and I had talked to them. None of them was under five years of age. They were speaking freely and appeared to be reasonably intelligent and smart. No doubt what they stated could not be given much weight as they were in the custody of their father but none of them appeared to be under pressure. They expressed desire to live along with their father.

10. In view of the above discussion, I am of the opinion that the sole paramount consideration of welfare of the children in this petition was with their father and not mother. The father, no doubt, was their natural guardian also as provided by Section 6 of the Hindu Minority and Guardianship Act 1956 but without attaching any importance to his status of guardian, I feel that it would be in the interest of the minor children if they live along with their father.

11. Both the parties have levelled allegations of immoral living upon each other but it is neither necessary nor possible in this petition to return a finding about the same. The said allegations of immoral living could be decided only after giving opportunity to the parties to adduce evidence including cross-examination of each other's witnesses. I, therefore, do not propose to enter into this question.

12. The petition in view of the above discussion is dismissed. O.P. No. 1 Sobhanath shall be entitled to keep the three detenus with him. No order is made as to costs which shall be borne by the parties themselves.

13. Petition dismissed.