

Smt. Usha Devi and anr. Vs. Kailash Narain Dixit and ors.

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Court : Madhya Pradesh

Decided On : Jan-21-1977

Reported in : AIR1978MP24; 1977MPLJ311

Judge : N.C. Dwivedi and ;C.P. Sen, JJ.

Acts : [Constitution of India](#) - Article 226

Appeal No. : Misc. Petn. No. 1078 of 1976

Appellant : Smt. Usha Devi and anr.

Respondent : Kailash Narain Dixit and ors.

Advocate for Def. : J.P. Gupta and ;R.K. Varma, Advs.

Advocate for Pet/Ap. : Fakhruddin and ;M.A. Khan, Advs.

Disposition : Petition allowed

Judgement :

Dwivedi, J.

1. This is a petition by the two petitioners Shrimati Usha Devi Dixit and Raviprakash Dixit, mother and father respectively, for a writ of habeas corpus directing the respondents to produce their son Manish Dixit alias Babloo aged about 41/2 years and for his custody to them.

2. The petitioners' case is this: They were married according to Hindu rites at Kanpur on 3-7-1971. Out of their wedlock, Manish Dixit was born on 17-6-1972 and was living with the petitioners. Respondents 1 and 2 are the father and uncle of petitioner No. 2 who is living separate from them since 1967. The petitioners are living with Reva-shanker Dixit at Sehora since 20-6-1967. On 8-11-1976, at 8.30 p.m., the respondents, armed with lathis, entered inside the house of the petitioners and forcibly took away their son Manish Dixit alias Babloo in spite of their protests and against their wishes. Since then, their minor son is living with the respondents. The petitioners approached the police and the Sub-Divisional Magistrate, but to no effect. The petitioners are the legal and natural guardians of the minor son and his welfare would be adversely affected if he is allowed to remain with the respondents. The child, being of tender age, if allowed to remain with the respondents for a long time, is likely to suffer physically as well as mentally.

3. This application was supported by an affidavit of petitioner No. 1 as also by Annexure 'A', report to the police lodged by Revashanker Dixit, uncle of petitioner No. 2, and Annexure 'B', notice sent to the respondents 1 and 2. Hence this petition for issue of writ of habeas corpus with the prayers for:

- (i) production of the child illegally and improperly detained, before this Court; and
- (ii) custody of the child to the petitioners.

4. The respondents, in their return, supported by an affidavit, controverted the allegations of the petitioners. They, however, did not dispute the birth date of Manish Dixit as being 17-6-1972 as also their being in custody of the minor child. They contended that petitioner No. 2 abandoned his wife after the birth of the child with the result that respondent No. 2 reared up the petitioner No. 1 and her son. This petition has been filed at the instance of Shrimati Urmila Dixit, wife of Revashanker Dixit. They contended that the child does not recognise its father nor has it received any paternal affection from him. The mother of respondents 1 and 2 is attached to the child and is rearing it up. Petitioner No. 1 who was a deserted wife, was educated by respondent No. 1. When she was busy with her studies, the child lived with its grand-mother. The petitioner No. 2 attempted to burn his wife

and did not see the child after three months of its birth. The relations of the parties compelled the petitioner No. 2 to keep the petitioner No. 1 with him. The compromise between petitioners 1 and 2 was brought about by the intervention of Shri Sachchidanand Awasthi Advocate.

5. The respondents further alleged that the condition of petitioner No. 1 is like a prisoner who is not permitted to contact her relations or to have correspondence with them. In the circumstances, she is unable to rear up the child. Petitioner No. 2 beats the child and the behaviour of Revashanker Dixit and his wife towards the child was not cordial and, therefore, the child was afraid of them and entreated that it should not be sent to live with its parents. Petitioner No. 2 forcibly took away the child on 8-12-1976 from Jabalpur when it was with its grand-mother and took it to Sehora. This seriously affected the health of the grand-mother and there was danger to her life. Therefore, under the direction of the grand-mother, the respondents 2 and 4 went to the petitioners at Sehora and entreated them to return the child. There they learnt that petitioner No. 2 had mercilessly beaten the child and kept it confined inside a room. The respondents heard the cries of the child from inside the room and found the child and its mother closed inside the room and both of them were weeping. The child was weeping and was repeatedly saying that it would not go to the petitioner No. 2. The respondents denied that they had forcibly removed the child from the custody of the petitioner. They contended that they have made arrangements for the education of the child and for properly looking after its welfare. The treatment of the petitioners towards the child is undesirable and the child itself does not want to live with the petitioners. It is in the interest of the minor that he should be permitted to live with the respondents and his grand-mother. They further contended that the Subdivisional Magistrate Sehora had enquired from the child regarding its wishes and the child expressed its desire to live with the respondents. Therefore, the applications dated 8-12-1976 and 13-12-1976 were rejected. On the above facts, the respondents prayed that the petition be dismissed. They have supported their return by an affidavit of respondent No. 1 and with Annexures A to F.

6. In response to the notice issued by this Court, the respondent No. 1 produced the child Manish Dixit before us. Shri Fakhruddin Advocate for the petitioners,

contended that the child is aged 41/2 years and the petitioners, being the mother and father respectively, are its natural guardians and it is in the interest of the minor that he should live with his parents. On the other hand, Shri J. P. Gupta Advocate for the respondents contended that the behaviour of petitioner No. 2 towards his wife was not good and that petitioner No. 2 attempted to burn his wife. He contended that the child itself is not willing to live with its parents and is attached to him (respondent?) and its grand-mother and they are taking proper care of its person and arranging for its education. We questioned the petitioner No. 2 who denied that he had attempted to burn his wife and both the petitioners stated that they were leading a happy married life.

7. We have considered the submissions of Shri Fakhruddin Advocate for the petitioners and Shri J. P. Gupta Advocate for the respondents. We have also perused the Annexures filed by the parties. We are of the view, for the reasons hereinafter stated, that the petition deserves to be allowed.

8. A perusal of the petition and the return brings out the following admitted position:

- (i) The petitioner are the mother and father of the minor Manish Dixit alias Babloo.
- (ii) The minor Manish Dixit was born on 17-6-1972 and is at present about 41/2 years old.
- (iii) Manish Dixit, the minor, was living with the petitioners on 8-11-1976 when he was taken away by the respondents.

9. According to the petitioners, they being the mother and the father of the minor, are the natural guardians and are entitled to the custody of the minor. They further asserted that their custody would be for the welfare of the child.

10. The respondents have alleged that the petitioners were not pulling on well and petitioner No. 2 attempted to burn petitioner No. 1. We find no support for this allegation and the petitioner No. 2, when questioned by us, denied anything of this sort having taken place with him and his wife. We are therefore, not impressed with the respondents' contention that relations between the husband and the wife

are not cordial. We feel convinced that at present, the petitioners are living cordially and their alleged strained relationship could not be a bar to the custody of their minor son, they being the natural guardians and entitled best to the custody of the child.

11. The petitioners alleged that the respondents took away their minor son under show of force on 8-11-1976. The respondents, in para 3 of their return, admitted that petitioner No. 2 forcibly took away the child from Jabalpur to Sehora on 8-12-1976. There appears to be some mistake in the date, because admittedly on 8-11-1976, the child was with the petitioners. The respondents contended that the child is afraid of petitioner No. 2, but there is no support for this allegation. The respondents contended that the petitioners were meeting out inhuman treatment to the child and have kept it confined inside the room where it was weeping, We find that the petitioners had lodged a report regarding the forcible removal of the child from their custody. (Annexure 'A'). The petitioner No. 1 also served a notice on the respondents Kailashnarayan and Jagdish-narayan for return of the child to her We find no support from the annexures of the respondents that the child was kept confined by the petitioner No. 2 in a room or that it was either beaten or caned.

12. On 14-1-1977, arguments were heard and the case was closed for orders with, a direction to the parties to remain present on 15-1-77 and to keep the child present. On this date, the respondents filed an application along with an affidavit of Dr. Shrimati Maya Tiwari, Assistant Surgeon, Sehora and prayed for taking it on record. The affidavit was taken on record and the petitioners were granted time to file, counter-affidavit. The case was then opened and the Government Advocate was directed to keep Dr. Shrimati Maya Tiwari present in Court along with all documents possessed by her concerning the facts sworn by her in the affidavit. On 18-1-1977, Dr, Shrimati Maya Tiwari was examined, cross-examined and discharged. Arguments were then heard. Dr. Shrimati Maya Tiwari admitted that she possessed no documents or record concerning the facts sworn by her in the affidavit and that she had given the affidavit on the basis of her memory. We will, therefore, scrutinise the evidence of Dr. Shrimati Maya Tiwari.

13. In the affidavit, Dr. Maya Tiwari stated that on 8-11-1976, she had gone to the house of the respondent No. 1 Kai-lashnarayan to treat his wife when the child Manish alias Babloo came in torn clothes and was weeping. She saw marks of injuries on his back, signs of cane beating on his thighs and finger marks on his face. On being questioned, Manish told that his father had beaten him and his mother did not save him. The weeping of the boy continued and Manish repeated that he would not go to his parents because he was afraid of them, Dr, Maya Tiwari further stated that the injuries were 4 or 6 hours old.

14. The affidavit of Dr. Maya Tiwari is not in conformity with her oral evidence. According to the affidavit, the date of incident was 8-41-1976, but according to Dr. Maya Tiwari, the incident took place on 18-11-1976 and she was positive about the date. Then she stated that the boy only told her that he was beaten by his father and nothing else and thereafter she did not question him further. In the affidavit, she mentioned that the boy told that his mother had not saved him and on being further questioned, he stated that he did not want to go to his parents, because he was very much afraid of them. The oral evidence of Dr. Maya Tiwari, therefore, falsified the narration of events of the respondents and if the evidence of Dr. Maya Tiwari is accepted, then nothing took place on 8-11-1976 as stated by the respondents and, therefore, their version of the incident that the boy was weeping, he and his mother were confined inside the room and he had marks of injuries on his person is belied by the evidence of Dr. Maya Tiwari.

15. Dr. Maya Tiwari is definite that the injuries on the person of the boy were, 4 or 6 hours old and thus if the incident took place on 18-11-1976, the Injuries would have come on the person of' the boy either on 17-11-1976 or 18-11-1976 and this totally falsified the respondents' version of the incident. If at ail Dr. Maya Tiwari found injuries on the person of Manish, they must have been caused either by the respondents or at their instance to support their defence of maltreatment by the petitioners.

16. The case was heard on 14-1-1977 and till that date, no affidavit in support of the injuries on the person of the boy was filed. Even during the course of arguments, no indication was given that the child was seen by Dr. Maya Tiwari on

8-11-1976. Though Shrimati Maya Tiwari herself did not report the matter to the police, yet she admitted that she had advised the respondent Kailashnarayan to lodge a report with the police. We questioned the respondent Kailashnarayan who stated that he had not lodged any report with the police, because it was a family affair.

17. The respondents, in the past, did not urge that the boy had injuries on his person or was examined by Dr. Shrimati Maya Tiwari. They were served with a notice by the petitioners, but they did not send any reply mentioning that the boy was maltrated by the petitioners and had injuries on his person which were confirmed by the examination of Dr. Maya Tiwari. Non-reference of Dr. Shrimati Maya Tiwari till the date of arguments on 14-1-1977 also indicated that the respondents' version that the boy had suffered injuries at the hands of the parents is definitely untrue.

18. We are, therefore, of the view that the affidavit of Dr. Shrimati Maya Tiwari and her oral evidence did not support the respondents' case and we hold that on 8-11-1976, when the respondents removed the boy from his parents, he was neither mal-treated, nor injured, nor was he and his mother wrongly detained in the house.

19. The respondents' case of maltreatment or wrongful confinement is also disproved from the recitals in para 3 of the respondents' return. The respondents stated that they approached the petitioners to give the boy in view of the shock suffered by the grand-mother and after the grand-mother recouped her health, they would return the boy. If all the contentions urged by the respondents had any grain of truth in them, then there was no question of the respondents thinking of returning the child to the petitioners after pacifying the grand-mother. We are, therefore, of the view that the petitioners neither maltreated, nor caned, nor wrongfully confined the boy and the respondents' return on this aspect of the case is definitely false.

20. We have considered the allegations of both the parties regarding the present custody of the child and the circumstances under which they are claiming its custody. We find that there is no substance in the respondents' contention that the petitioners were ill-treating the child or were not giving it parental affection. On the

other hand, we find substance in the contention of the petitioners that the minor Manish Dixit was taken away by the respondents against their wishes and was being detained by them. There is no evidence that the petitioners have consented to the living of the boy with the respondents or his grand-mother.

21. The respondents' main opposition was based on the orders passed by the Sub-Divisional Magistrate, Sehora on 8-12-1976 and 24-12-1976. The boy was produced by the respondent Kailashnarayan in Court and he went to the respondent Kailashnarayan. The Sub-Divisional Magistrate felt that the boy wished to live with the respondent Kailashnarayan and, therefore, dropped the proceedings. The boy, aged 4 1/2 years, has no independent volition of his own and will prefer to live with the person in whose custody he is then. The association of a boy with persons, especially relations and the grand-mother for some-time will make him dear to them, but the respondents, in preference to the father and mother, have no legal right to the custody of the minor and the welfare of the boy lies in his living with his natural guardians who are best suited persons to take care of him and rear him in their own traditions.

22. We find no substance in the contention of the respondents that the petitioners can take recourse to the Guardians and Wards Act. Since the respondents have no legal right to the custody of the minor son of the petitioners, their refusal to return back the boy to the petitioners results in an illegal detention of the boy. The fact that the petitioners have a right to relief under the Guardians and Wards Act is no justification for denying the petitioners the clear right for the custody of the minor. See Gohar Begum v. Suggi, AIR 1960 SC 93. The following observation will also be material (at p. 96):--

'When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.'

'Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person.'

23. In *Kalimunnisa v. Shah Salimkhan Rehmankhan*, 1976 MPLJ 621, it has been held that welfare of the minor is paramount. In *Veena Prahlad Das Agarwal v. Prahlad Das Agarwal*, 1976 MPLJ 41 : (AIR 1976 Madh Pra 92) the following observations are material (at p. 93 of AIR) :--

'Section 6(a) of the Hindu Minority and Guardianship Act which provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother, gives legislative sanction to the well-established principle that although the father is the natural guardian of the minor child and entitled as such to the custody of the minor, the prime and paramount consideration is the welfare of the minor and custody of a minor of tender age should, therefore, remain with the mother unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. The fact that even the father can arrange to look after the child is not a good ground for depriving the mother of the custody of the child.'

'For the custody of a minor child the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be and it is only in exceptional cases that the rights of the parties to the custody of the child shall be determined on a petition for habeas corpus which is an extraordinary remedy. The guardian's claim to custody of the child is not a right in the nature of property, but in the nature of trust for benefit of minor.'

24. In *Mrs. Annie Besant v. G. N. Narayaniah*, AIR 1914 PC 41, it is observed as under:--

'Whatever may be the jurisdiction of the High Court to declare infants to be Wards of Court, an order declaring a guardian can only be made if their interest require it. On such an issue, the necessity of the infants being properly represented before the Court, and ascertaining what they themselves desire, can hardly be overlooked. And further, no order declaring a guardian can, by reason of Section 19 of the Guardians and Wards Act, 1890, be made during the lifetime of the father, unless in the opinion of the Courts he is unfit to be their guardian.'

25. In *Bhagwati Bai v. Yadav Krishna Awadhiya*, 1968 MPLJ 685 : (AIR 1969 Madh Pra 23), it is held as under (at pp. 24, 25 of AIR) :--

'The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is being used against the minor by the respondent.

The paramount consideration in every such case when custody of minor is sought either under the provisions of Article 226 of the Constitution by a writ of habeas corpus or by Section 491 of the Criminal Procedure Code, is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary.'

26. Shri J. P. Gupta, Advocate for the respondents referred to a decision of this Court in Misc. Cr. Case No. 471 of 1970, decided on 18-11-1970 (MP). In that case, the scope of enquiry was whether the infant should be taken away from the foster parents and delivered to the natural father. In that case it was not as if the respondents, by force or fraud, removed the minor from the lawful guardianship. The initial entrustment of the infant's custody to the respondents was with the petitioner's consent. It was further found that the petitioner had to go to the factory for work and there was no grown up female to look after, the infant. On these facts, the infant remained with the foster mother. The facts of our case are distinguishable and, therefore, this decision can have no application to the case in hand.

27. We have scrutinised the petitioners' allegations, the return of the respondents, the affidavit of Dr. Shrimati Maya Tiwari and the facts and circumstances of the case. We find that the petitioners are living happily. They have also stated before us that their relations are cordial and there is no conflict or misunderstanding between them. It could not, therefore, be urged that the conflict between the husband and wife will have adverse effect on the rearing of the minor. The parents, being the natural guardians, could not be deprived of the custody of their own son aged 4 1/2 years in the absence of any weighty considerations. We find that the respondents' stand of cruelty to the minor by his parents is without foundation. The boy, if kept away from his parents, will be deprived of the parental affection and will, after some time, become stranger to them. This will not be in the interest of the minor.

28. The petitioners, when questioned by us, told the Court that they will treat the minor with care and attention and will give him the desired affection and will not ill-treat him. They also assured that they will permit the respondents and the grandmother to occasionally visit the boy and fondle him. Such visits may either be weekly or fortnightly. In case the respondents find that the petitioners are not taking proper care or ill-treating the boy, they may, if so advised, take recourse to any remedy available to them under law. The respondents, on the facts of this case, are not entitled to retain the custody of the minor and their insistence to keep him with them amounts to illegal detention of the boy. The boy, being of tender age, should live with his parents and we find no grave or weighty consideration to refuse custody of the boy to his parents. The interests of the minor can be best served if he is under the care and custody of the parents.

29. We have considered the minor's material and physical well-being, his prospects of education, his up-bringing as well as happiness and moral welfare in the light of the law as stated above. We are of the view that the interests of the minor will be best served if he is placed in the care and custody of his natural parents. We, therefore, think it proper to give a direction to the respondents to return the minor Manish Dixit alias Babloo to the petitioners.

30. For the reasons given above, the petition succeeds and is allowed. The respondents are directed to return the minor Manish Dixit alias Babloo to the petitioners forthwith. Parties shall bear their own costs as incurred.

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