

SUPREME COURT OF INDIA

Sumedha Nagpal

Vs.

State of Delhi

(S. R. Babu and S.N. Phukan JJ.)

03.03.2000

ORDER

S. RAJENDRA BABU, J.

1. The Petitioner is the mother of a child of tender age of about two years and claims his custody on the ground that she has been deprived of the same by deceitful means by Respondent No. 2, the father, by driving her out of the house; that under proviso to Section 6(a) of the Hindu Minority and Guardianship Act, 1956 [for short 'the Act'], the custody of a minor child, who has not completed the age of five years should ordinarily be with the mother recognising the universally accepted notion of maternal instinct and selfless love, who needs her affection and for which there is no adequate substitute; that the paramount interest of the child lies in giving such custody to her instead of continuing such custody with the father. The case of Respondent No.2 on the other hand, is that the Petitioner abandoned the child and went to her parent's house and, therefore, the question of her claiming the custody does not arise at all. More so, when the child is in his custody to the exclusion of the Petitioner for nearly seven months, that is, from August 1,1999 and any disturbance by changing the custody now is not conducive to the welfare of the child. It is also contended on behalf of the Respondent No.2 that, however expansive may be the concept of life and liberty under Article 21 of the Constitution, it would not give rise to a right to issue of a writ of habeas corpus under Article 32 of the Constitution thereby treating the custody of the child with him as unlawful so as to give the custody of the child to the Petitioner. Whatever may be the rights arising under proviso to Section 6(a) of the Act, the same would not militate against the welfare of the minor child and particularly in the absence of any material to show that such welfare is in jeopardy, this Court ought not to exercise its power under Article 32 of the Constitution. Learned Counsel on either side have relied upon a large number of decisions to support their respective cases, but in the view we propose to take, it is unnecessary to examine any one of them.

2. Both parties do recognise that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter allegations have been made in this case by the Petitioner and Respondent No.2 against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary

proceeding such as writ petition under Article 32 of the Constitution.

3. Without expressing any view on the pleadings raised in this case and making it clear that it is neither appropriate nor feasible in the present case to investigate the correctness of the same and decide one way or the other, we propose to relegate the parties to work out their respective rights in an appropriate forum like the Family Court or the District Court in a proceeding arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act or for matrimonial relief.

4. Even at this stage, Shri D.D. Thakur, the learned Counsel for the Petitioner, laid great emphasis that we should not shirk our task at least with respect to the limited question of ordering restoration of the custody of the minor child to the mother. He submitted that though Section 6 of the Act recognises guardianship of the minor child with both the parents, exclusive right of the mother is recognised in respect of the custody of a minor child below five years. This legislative recognition of the maternal instinct should be honoured by us by treating the custody of the child with the father as illegal and the custody should be handed over to the mother pending the proceedings suggested by us earlier in the course of this order.

5. In deciding such a question, what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. In the pleadings and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned Counsel for the Petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever, we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D. Thakur as to grant of interim custody to the Petitioner, we should not be understood as having held a petition would lie under Article 32 for grant of custody of minor child, we refrain from examining or deciding the same.

6. Before parting with the case, we cannot but express our deep anxiety over the matter. No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are I required for the welfare of the child and we do hope that in this case the Petitioner 1 and Respondent No.2, the parents, would realize what their responsibility should be and set right their broken home for the sake of their child.

7. On this note, we dismiss this writ petition, however, making it clear that it is open to the Petitioner or Respondent No.2 to file appropriate proceedings as stated earlier in the course of this order in the court of competent jurisdiction.