

REPORTED

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : December 07, 2007

DATE OF DECISION : April 1, 2008

+ W.P.(Crl.) 793/2007 and Crl. M.A. No.6724/2007

SHEELA

..... Petitioner

Through: Mr. M.K. Singh, Advocate

versus

STATE NCT OF DELHI & ANR. Respondents

Through: Ms. Mukta Gupta, Standing Counsel for the
State.

Mr. J.N. Verma, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. In this writ petition, the petitioner prays for the issuance of a writ of habeas corpus directing the respondent No.2 to produce the son of the petitioner, Rohit, aged about four years and to hand over the custody of the said child to the petitioner. A writ of mandamus or any other writ or direction to the respondent No.1 to register an FIR against the respondent No.2 is also prayed for.

2. On issuance of notice to the respondents, the respondent No.2—husband

appeared in person and by an order dated August 21, 2007 was directed to hand over the custody of the child to the petitioner–mother in the Court. The petitioner was, however, directed to bring the child on the following day to the Court, that is, on 22nd August, 2007. On the said date, an order was passed by a Division Bench of this Court, which reads as under:

“Husband of the petitioner is present in the Court and he undertakes to take his wife and son to his place of work from Delhi. They shall live together as husband and wife and report to this Court on the next date.

The father of the petitioner Sh. Roop Singh Sajwan and father of respondent no.2 shall give their undertakings of the good conduct and behaviour of the petitioner and respondent no.2. They shall also state in the said undertakings that they will not in any manner ill treat the wife Smt. Sheela and Master Rohit. The father of Smt. Sheela shall also give an undertaking ensuring good behaviour and conduct of his daughter, which shall be kept on record.

List on 28th November, 2007, when Smt. Sheela, her husband along with her child shall be present in the Court.”

3. Pursuant to the aforesaid order, undertakings were furnished by the parties, i.e., the petitioner, the respondent No.2, the father of the petitioner, Shri Roop Singh Sajwan, and the father of the respondent No.2, Shri Anand Singh Rawat, in terms of the aforesaid order. The custody of the child was consequently allowed to remain with the petitioner–mother for the time being. In order to ensure compliance with the order, the case was adjourned to 28th November, 2007 when the petitioner, the respondent No.2 and the child were directed to be present in Court.

4. On 28.11.2007, this Court was informed by Ms. Mukta Gupta, the Standing Counsel for the State that the petitioner, who had undertaken to go to the place of work of the respondent–husband from Delhi, did not comply, though the respondent–husband showed his willingness and even rented an independent accommodation for the purpose of residing together with the petitioner and his child. In view of the aforesaid statement made by the counsel for the State, she was directed to file a comprehensive report and it was ordered that till then, the child shall remain with the respondent No.2–husband. The custody of the child was accordingly restored to the husband. The following order was passed by this Court and the matter was adjourned to 7th December, 2007 to enable the parties to comply with the order:

“On 21st August, 2007, the custody of the child was handed over to the petitioner-mother on the ground that she undertook to go to the place of work of the respondent-husband from Delhi. The counsel appearing for the State informs us that the petitioner did not do so though the respondent showed his willingness and had in fact, rented an independent accommodation.

Counsel for the State is directed to file a comprehensive status report bringing the up-to-date development of the case on record before the next date of hearing. Till then, the child shall remain with the husband who will ensure the presence of the child on the next date of hearing and the child shall be handed over to the husband by the petitioner in the chamber of Ms. Mukta Gupta, counsel for the State.

List on 7th December, 2007.”

5. A detailed status report came to be filed by the State Counsel, which happens to be the last in a series of three status reports filed by the respondent

No.1–State. A conjoint reading of the aforesaid status reports shows that the present writ petition has emanated from a marriage gone sour between the petitioner and the respondent No.2. The conjugal knot which was tied on 11.10.2002, according to the petitioner was strained by demands for dowry and by the mental torture inflicted upon her by her husband and in-laws; whereas according to the respondent No.2, the marital ties were strained by the intervention of a third person by the name of Mr. Dheeraj Singh Sharma, who has a magnetic effect upon the petitioner. Be that as it may, a spate of complaints came to be filed by the petitioner against the respondent No.2 and his family members, the first being an FIR bearing registration No.248/2007 dated 31st March, 2007 under Sections 498A/406/34 IPC.

6. It is further set out in the status report that while investigation was still in progress in the said FIR, a second complaint was received from the petitioner to the effect that she had been receiving threat calls, and at the instance of the petitioner the relevant section being Section 506 IPC was added to the case, after completing the formality of recording her statement under Section 161 Cr.P.C. The petitioner had alleged in the aforesaid complaint that she had received threat calls from three mobile Nos. – 9719807942, 9971919438 and 9412994813. However, the investigating agency found that no phone calls were received on the cell-phone of the petitioner from the said three mobile numbers though on examining the caller ID attached to the petitioner's landline phone, it was found

that some calls had been received from the above mentioned three mobile numbers. As per the petitioner, the said mobile phones belong to her husband, which matter is stated to be still under investigation. The petitioner had also alleged in her complaint that she was forcibly aborted, without her consent, at the E.S.I. Hospital, but on enquiry being made from the said hospital, it was revealed that the MTP of the petitioner was carried out with the written consent of the petitioner submitted to the doctor by the petitioner herself.

7. In the meanwhile, the present petition came to be filed by the petitioner praying for the production and custody of her son. When the matter was listed before the Court on 21st August, 2007, the petitioner appeared before the Court and alleged that the respondent No.2 had beaten her. An enquiry was directed to be made by the Court into the matter and in compliance with the aforesaid order, the petitioner was medically examined vide MLC No.19711. The statement of the petitioner was also recorded, wherein she stated that she was beaten with fists and legs by her husband and her brother-in-law at night, and that her husband had had physical relations with her against her will. Investigations conducted by the police and the recording of the statements of the witnesses including the neighbours, however, led the investigating agency to assert in the status report that no such incident of quarrelling had taken place and according the MLC also, only one minor abrasion was found on the hand of the petitioner, which was opined by the doctor to be a simple blunt injury.

8. A reading of the order passed on the following day, that is, on 22nd August, 2007, reproduced hereinabove, shows that on the said date both the parties stated before the Court that they had decided to live together and that the husband of the petitioner had undertaken to take the petitioner and his son to his place of work from Delhi. As set out in the said order also, both the parties were directed to file affidavits and undertakings in order to ensure maintenance of good behaviour and the same were filed by them. According to the status report, however, the petitioner did not rejoin her husband, and on 01.11.2007, a PCR call vide DD No.18A was received at Police Station Moti Nagar regarding a quarrel, which was entrusted to Head Constable Dev Dutt, who reached the spot and found the respondent No.2 present at the parental home of the petitioner, who stated that in pursuance of the undertaking given to this Court, he had come to his in-laws' house to take his wife and child with him, but his wife had refused to go with him and her father was also refusing to send her. The petitioner, who was also present, categorically refused to go with the respondent No.2 and stated that she would appear before this Court on 28.11.2007. Since the investigating agency found that no incident of fighting or quarrelling had taken place, the matter was dropped.

9. Counsel for both the parties have been heard by us at some length in the presence of the parties. It is apparent from the record that considerable efforts have been made by the Court to sort out the matter. It is also clear from the record

that the efforts proved altogether futile in view of the rather adamant stand adopted by the petitioner. The petitioner to us appears to be interested only in instituting and prosecuting complaint after complaint against the respondent No.2—husband for reasons best known to her, and seems not at all interested in resuming cohabitation with him. The present writ petition also appears to us to have been filed by the petitioner against the respondent No.2 as a devious device to get the custody of the child from the respondent No.2—father, in which she appears to have been successful for a short spell of time. A facade was no doubt put up by her before the Court of willingness to live with the petitioner, which, however, could not be kept up for long. There can be no manner of doubt that the marriage has gone awry and is on the rocks. The respondent No.2 expressed his willingness before this Court to live with the petitioner and even went to the extent of obtaining rented accommodation for the aforesaid purpose, but the petitioner appears to be totally averse to residing with the respondent No.2, and all efforts made by him to live together with her have been rebuffed by her by levelling every conceivable and uncalled for allegation against him. The petitioner, in fact, seems to us to be in the habit of levelling baseless allegations against the respondent, merely with a view to harass him. She cannot be allowed to take advantage of her own wrongful conduct for obtaining the custody of the child. Even otherwise, the custody of the child, in our view, must be given to the parent capable of ensuring the welfare of the child and it is not for this Court in

writ proceedings to determine where the welfare of the child lies. This is essentially a matter of evidence and in the domain of the Guardian Court. We, therefore, see no conceivable reason to trespass or stray into the said domain by issuing a writ of habeas corpus in favour of the petitioner for handing over the custody of the child to the petitioner, which is presently with the respondent No.2.

A three-Judge Bench of the Hon'ble Supreme Court in the case of ***Dr.(Mrs.)***

Veena Kapoor Vs. Shri Varinder Kumar Kapoor (1981) 3 Supreme Court Cases

92 has observed as under:-

“2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal

3. It is difficult for us in this habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined.”

10. The ratio laid down in the case of ***Veena Kapoor*** (supra) has also been reiterated by the Hon'ble Supreme Court in the case of ***Rajesh K.Gupta Vs. Ram Gopal Agarwala and Others (2005) 5 Supreme court Cases 359*** which is read as

follows:.

“7. It is well settled that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case

of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. [See Veena Kapoor (Dr.) Vs. Varinder Kumar Kapoor and Syed Saleemuddin v. Dr. Rukshana.]. It is, therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father”.

11. We, therefore, leave the parties to battle out the custody of the child in appropriate proceedings before the appropriate fora. The writ petition is accordingly dismissed as being without merit, leaving the parties to bear their own costs. Crl. M.A. No.6724/2007 also stands disposed of accordingly.

REVA KHETRAPAL, J

MUKUL MUDGAL, J.

APRIL 1, 2008

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