

AFR

RESERVED ON 6.11.2023

DELIVERED ON 24.11.2023

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 137 of 2022

Petitioner :- Master Vedant Mishra Thru. Father Amritanshu Mishra

Respondent :- State Of U.P. Thru. Prin. Secy. Home Deptt. Lucknow And Others

Counsel for Petitioner :- Anand Dubey

Counsel for Respondent :- G.A.,Anuj Pandey

Hon'ble Karunesh Singh Pawar,J.

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite parties to produce the corpus of detenu in Court and give him in the custody of the deponent/father Amritanshu Mishra.

2. Heard learned counsel for the petitioner and learned Additional Government Advocate as also learned counsel for respondents 4 to 6.

3.Learned counsel for the petitioner submits that the marriage of father of the detenu was solemnised on 22.4.2015 with the deceased Rani Shukla. The petitioner was blessed with one boy, i.e. detenu on 1.2.2017 out of wedlock. The mother of the detenu was in extra marital affair with one Sonu Ranjan, due to which frequent quarrel occurred between the duo. The mother of the detenu committed suicide on 9.8.2020 under impulse and anger as the father of the detenu asked her to stop having relationship with Sonu Ranjan.

After death of mother of the detenu, first information report was registered against his father, bearing case crime No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act. The father of the detenu was enlarged on bail by this Court vide order dated 4.3.2022. It is alleged that after death of

mother of the detenu, respondents 4 to 6 have taken undue advantage and taken over unlawful custody of the detenu. The father of the detenu went to respondents 4 to 6 for custody of his son detenu but they refused to give his custody to the deponent.

It is submitted on behalf of the petitioner that as per Section 6 of Hindu Minority and Guardianship Act, 1956, father is the natural guardian of child and is entitled to have the custody of the detenu. Relying on the judgment in **Nil Ratan Kundu and another** versus **Abhijit Kundu** (2008)9 SCC 413 (particularly paras 57, 58, 63, 65, 66, 67), it is submitted that the character of the proposed guardian is required to be considered to determine suitability of the father to have custody of the minor child.

It is submitted that there is no case law to the effect that the proposed guardian be denied custody of the child only on the ground of pending criminal trial against him. Welfare of the child has to be the top consideration while deciding the custody of the child.

It is also submitted that even from perusal of the statement of prosecution witnesses, it is clear that the deceased committed suicide.

4.Per contra, learned A.G.A. and learned counsel for the complainant have opposed the prayer.

It has been submitted on behalf of respondents 4 to 6 that on 9th August, 2020, mother of the detenu was murdered by the deponent who is father of the detenu, relating to demand of dowry. He is accused in first information report No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act, P.S. Raunahi, district Faizabad. Charge sheet has been submitted and the accused is facing criminal trial.

It is submitted that since his birth, the child is living safely with

his maternal parents without any pressure and is pursuing his studies. It is further submitted that the deponent who is an accused of murder of mother of the detenu cannot be given custody of the child as such custody would not only emotionally devastate and destruct proper growth of the detenu- both physical and mental, but also his overall welfare will be compromised.

Learned counsel for respondents 4 to 6 has also relied on Nil Ratan Kundu's case. It is submitted that pendency of the criminal case where father is charged of causing murder of minor's mother is relevant factor and is required to be considered before an appropriate order could be passed.

5. It is not disputed between the parties that mother of the detenu died on 9.8.2020. It is also not disputed that a first information report No.331 of 2020 under sections 498A, 304-B I.P.C. and 3/4 Dowry Prohibition Act is registered and after filing of charge sheet, the accused deponent is facing criminal trial. It is further not disputed that since birth, the detenu is residing with his maternal uncle and maternal grandparents. This Court in order to assess the wish of the detenu who is about six years of age called upon him in chamber. On a query being made, the detenu immediately expressed his will for staying with respondents 4 to 6. The detenu appears to be a bright and intelligent boy.

6. As regards submission of learned counsel for the petitioner that mere pendency of a criminal trial will not dis-entitle the deponent in seeking custody of the child, it will be apt to refer to the judgment in Nil Ratan Kundu's case (supra). Relevant paras 63, 64 and 66 are extracted below :

" 63. In our considered opinion, on the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations against the respondent herein and pendency of criminal case for an offence punishable under Section 498A IPC. **One of the matters which is required to be considered by a Court of law is the 'character' of the**

proposed guardian. In Kirit Kumar, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle.

64. Thus, a complaint against father alleging and attributing death of mother and a case under Section 498A IPC is indeed a relevant factor and a Court of law must address to the said circumstance while deciding the custody of the minor in favour of such person. To us, it is no answer to state that in case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and appropriate order ought to have been passed.

*66. In our considered opinion, the Court was not right. Apart from statutory provision in the form of sub-section (3) of Section 17 of 1890 Act, such examination also helps the Court in performing onerous duty, in exercising discretionary jurisdiction and in deciding delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the Court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. **Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given.**"*

(Emphasised)

A perusal of the judgment in Nil Ratan Kundu's case (supra), it is evident that pendency of a criminal case is definitely one of the considerations for assessing the character of the proposed guardian. It is true that evidence is yet to be led and the trial is yet to conclude and unless the accused is convicted, no aspersions can be cast. However, considering the ratio of the judgment in Nil Ratan's case (supra), the fact that the deponent is facing trial for the murder of his wife cannot be ignored, which is one of the major factors to be considered and which goes against him. This Court has taken note of the fact that the child since his birth, i.e. almost six years is residing with respondents 4 to 6 and is pursuing his studies.

7. A coordinate Bench of this Court in **Reshu alias Nitya and others versus State of U.P. and others** (2021)6 ALJ 632 while considering the similar allegations and also considering the judgment in Nil Ratan Kuundu's case (supra) in detail has held as under in para 58 :

"58. The aforementioned facts do not indicate that the custody of the minor with

the respondent no. 4 can in any manner be said to amount to an illegal and improper detention. The child from her infancy, when she was of a tender age, appears to be living with her maternal grand-father. This together with the fact that the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor. The other considerations which would have a material bearing would be the necessity of the child being provided loving and understanding care, guidance and a warm and compassionate relationship in a pleasant home, which are essential for the development to the child's character and personality."

8. Thus, keeping in view the law laid down by Supreme Court in the case of Nil Ratan Kundu, the fact that the deponent is facing trial for the murder of mother of the detenu, the detenu is residing since his birth with his maternal uncle and maternal grand parent, he is pursuing his education there and present petition has been filed in the year 2022, after five years from birth of the detenu and the delay and laches having not been explained at all, as also considering the overall interest and welfare of the detenu, in peculiar facts of this case, I am not inclined to issue a writ of habeas corpus in favour of the petitioner.

9. The petition fails and is accordingly dismissed. However, the deponent shall have the visiting rights of the detenu. Accordingly, the deponent shall be permitted to visit the detenu on every first and third Sunday between 10.00a.m and 5.00p.m.

Order Date :- 24.11.2023

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