

A.F.R.

RESERVED ON 6.11.2023

DELIVERED ON 24.11.2023

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 26085 of 2021

Petitioner :- Vedant Through. Father Vishnu Kumar @ Vishnu Kumar Ayodhyavasi

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

Counsel for Petitioner :- Ramakar Shukla, Ravindra Gupta

Counsel for Respondent :- G.A., Abhishek Misra, Anand Dubey, Firoz Ahmad Khan, Gajendra Singh Chauhan, Saurabh Verma

Hon'ble Karunesh Singh Pawar, J.

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite party No.4 to produce the detenu Vedant in Court and give him in the custody of the deponent/father Vishnu Kumar alias Vishnu Kumar Ayodhyavasi Sonar.

2. Heard learned counsel for the petitioner and learned Additional Government Advocate as also learned counsel for respondent No.4.

3. Learned counsel for the petitioner submits that the marriage of father of the detenu was solemnised with Aprajita (now deceased) on 10.2.2018. Out of wedlock, the detenu was born on 19.4.2019. On 11.11.2019, Aprajita met with an accident and suffered burn injury. She was taken to Sushrut Institute of Plastic Surgery Burn and Trauma at Lucknow, however, she could not survive and succumbed to the injuries on 20.11.2019. During treatment, the doctor recorded the statement of the deceased wherein she has stated that while offering prayer, she met with an accidental burn injury. During her treatment between 11.11.2019 and 20.11.2019, respondent No.4 and his other family members were present in the hospital. During all this period, they have not levelled any allegation against the

deponent Vishnu Kumar.

On 26.7.2021, respondent No.4 took the detenu to his house and confined him. The deponent Vishnu Kumar along with his father went to the house of respondent No.4 to bring his minor son but respondent No.4 Shachindra Dev Arya refused to return the detenu. In the meantime, due to the dispute regarding the custody of the detenu between the parties, an application under section 156(3) CrPC was given by respondent No.4 on 21.8.2021.

The deponent filed the present petition of habeas corpus before this Court on 8.11.2021. After exchange of pleadings, vide interim order dated 10.12.2021, this Court has handed over custody of the detenu to the petitioner. After the custody was handed over to the petitioner, on 13.12.2021, a first information report No.342 of 2021 under sections 498-A, 304-B, 506 I.P.C. and sections 3/4 Dowry Prohibition Act, P.S. Musafirkhana, district Amethi was registered against the petitioner and other family members after more than two years of the death of mother of the detenu. After investigation, the investigating officer submitted final report in favour of the petitioner in first information report No.342 of 2021 (supra) on 25.2.2022. A protest petition was filed by the respondent No.4 and the learned Magistrate has directed for further investigation on the protest application. The petitioner deponent performed second marriage on 8.7.2022 and the detenu is enjoying the company of his father and step mother along with grand parents.

After further investigation, police did not find any complicity of the deponent and again a final report was submitted in favour of the petitioner on 14.10.2022. Second protest petition was filed by respondent No.4 on 15.2.2023 which was treated as a complaint. Till date, no summoning order has been passed.

Learned counsel for the petitioner has submitted that the detenu

is aged about 4 1/2 years school going child and has been living with the petitioner since long, and being father and natural guardian, the petitioner is entitled custody of the detenu.

In support of his contention, learned counsel for the petitioner has relied on judgment in *Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari* (2019)7 SCC 42 (paras 14, 19, 21), *Garv Mishra (Minor) through his father Anurag Mishra versus State of U.P. and others Habeas Corpus No.24874 of 2019* (paras 5, 11, 14, 15).

4.Per contra, learned counsel for respondent No.4 has submitted that the character of the father of the detenu is suspicious in nature. He has murdered the mother of the detenu and a complaint case for the same is pending against him. The respondent No.4 has proposed to bequeath a shop featuring glass business in the name and style of the detenu to look after the overall welfares of the detenu and his financial condition. In this context, learned counsel has relied on **Nil Ratan Kundu and another** versus **Abhijit Kundu** (2008)9 SCC 413. It is submitted that the father of the detenu can be summoned at any moment in the dowry death case, as such, future of the detenu is at stake and it will be appropriate to give custody of the child with respondent No.4.

5.I have considered the submission and perused the record.

6.The facts which emanate from the pleadings made and submission advanced are that the marriage of the mother of the detenu took place on 10.2.2018. The detenu was born on 19.4.2019 out of the wedlock. Late mother of the detenu Aprajita suffered burn injury and died on 20.11.2019 after being remained under treatment for nine days. Between 11.11.2019 and 20.11.2019, no allegation was levelled by respondent No.4 or his family members against the deponent regarding the death of mother of the detenu.

This Court vide order dated 10.12.2021 handed over custody of the detenu from respondent No.4 to the present deponent of the petition and since then, he is living with him. First Information Report No.342 of 2021 under sections 498A, 304 B, 506 I.P.C. and sections 3/4 Dowry Prohibition Act was registered against the deponent and against his family members on 13.12.2021, i.e. after two years from the death of the mother of the detenu. Twice final report was filed in favour of the petitioner, i.e. on 25.2.2022 and 14.10.2022.

The second protest petition, filed against the final report, was treated as a complaint case and till date, summoning order has not been passed against the petitioner. The detenu is presently 4 1/2 years of age. Lastly, the deceased Aprajita had made a statement that while offering prayer, she caught fire and due to that, she got burn injury. The statement is on record.

The petitioner in para 9 has pleaded that the custody of the detenu was taken by respondent No.4 on 26.7.2021. The respondent No.4 while filing first counter affidavit, though has denied the averments contained in para 9 of the petition, however, the date on which the custody of the detenu was taken has not been given.

Likewise, in the second counter affidavit dated 8.8.2023 filed by respondent No.4 again, no specific date has been given by respondent No.4. On the contrary, it has been admitted in para 8 that respondent No.4 participated in the Mundan ceremony of the detenu on 28.6.2021 and after attending Mundan ceremony on his request, the deponent gave the custody of the detenu to respondent No.4.

7.It has been argued by respondent No.4 that the deponent/father of the detenu did not care to look after of his son for two years. This argument is contrary to record and pleadings by the parties in the writ petition. It is evident from

the pleadings that the custody of the detenu was given to respondent No.4 and it remained with respondent No.4 till 10.12.2021 when the custody was again given back to the deponent and since then, the custody is with the deponent. So only for a brief period of more than four months, the custody remained with respondent No.4.

8.In Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (2019) 7 SCC 42, Supreme Court has held that the detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention. Relevant paras 14, 19 and 21 are extracted below :

"14. 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 as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first

respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

9.While opposing the petition, learned counsel for respondent No.4 has relied on judgment in Kirtikumar Maheshankar Joshi versus Pradipkumar Karunashanker Joshi (1992) 3 SCC 573 and submitted that since father was facing charges under section 498-A I.P.C., custody to the father was refused.

10.In the case of Kirtikumar (supra), the detenues were matured enough than their age. They were intelligent enough to take decision regarding their choice and they refused to go with the father. The accused of that case who was father was also facing charge under section 498A I.P.C..

11.This Court has also asked opinion of the detenu who is currently 4 1/2 years old and seems to be intelligent enough and without waiting, he has shown his inclination towards father and has stated in clear words that he wants to reside with his father. In this case, twice final report(s) have been filed. Although on the second final report, a protest petition was filed which was registered as a complaint case, this court cannot lose sight of the fact that the first information report was filed after two years from the date of death of the mother of the detenu and after custody of the detenu was transferred by court's order on 10.12.2021. The first information report was filed on 13.12.2021.

Summons in this case are yet to be issued. The trial is yet to commence. Even, at this stage, it will be premature to say, particularly in view of the statement of the deceased before the doctor that she suffered burn injury while offering prayer, that the deponent is even an accused in that case and therefore, I am of the opinion that the judgment in Kirtikumar's case (supra) is distinguishable in view of the peculiar facts of this case.

This court has noticed that the detenu since his birth was

residing with his father. He is presently 4 1/2 years of age and for a brief period of about four months, he resided with respondent No.4. He has expressed his wish to stay with his father. As said above, even the summons have not been issued in the complaint case. Charges are yet to be framed. The father being the natural guardian is entitled to the custody of his child in view of the judgment in Tejaswini Gaud's case (supra).

12.On due consideration to the submission advanced and perusal of the record, it appears that initially after death of mother of the detenu on 20.11.2019, the respondent No.4 was very much present in the hospital along with the deponent. The signature of respondent No.4 on the treatment papers, precisely page No.14 of the petition, is on record, statement of the deceased at page 15 before the doctor go to show that there was no dispute whatsoever between the parties at that time. Thereafter, on 26.7.2021, the detenu was taken by respondent No.4.

It appears that the dispute started when the deponent wanted custody of the detenu back from respondent No.4 which was given by him temporarily which was resisted by respondent No.4 and then, after two years, he filed an application under section 156(3) CrPC on 21.8.2021 on which first information report was registered on 13.12.2021.

Considering the fact that the custody of the detenu has been given back to the deponent by this court vide order dated 10.12.2021, father is the natural guardian under section 6 of the Guardians & Wards Act, coupled with the choice of the detenu who is 4 1/2 years old and has expressed his willingness to reside with the deponent who is father, in peculiar facts of this case, I am of the opinion that at this stage, transferring the custody of the detenu to respondent No.4 may not be in the best and overall interest of the child as for around 4 years, he has lived with his father.

For the reasons aforesaid, the petition is allowed and the interim order dated 10.12.2021 is confirmed. The deponent is permitted to continue with custody of the detenu, however, the respondent No.4 shall have the visiting rights on every fortnight on Sunday between 10.00a.m. and 5.00p.m. at the residence of the deponent. However, in case of changed circumstance by virtue

of Court's order, it shall be open for respondent No.4 to approach this Court for change of custody.

Order Date :- 24.11.2023/kkb/