Labh Singh and Chanan Singh Vs. Superintendent, Nari Niketan

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Court : Punjab and Haryana

Decided On : Feb-28-1961

Reported in : 1961CriLJ542

Judge : Tek Chand, J.

Appellant : Labh Singh and Chanan Singh

Respondent : Superintendent, Nari Niketan

Judgement :

ORDER

Tek Chand, J.

1. This is a petition for the issuance of a writ of habeas corpus filed by Labh Singh of village Rajgarh Tehsil Sirhind District Patiala, praying that the respondent who is the Superintendent. Nari Niketan, 60 Majitha Road, Amritsar should produce a minor girl Gurmail aur and she be handed over to him.

2. The case for the petitioner is that in 1947 he saw an infant girl aged about 18 months lying alone on the roadside uncared for. He out of sympathy picked her up and brought her to his house and he has nurtured her as his own child lavishing parental love. Two years prior to this petition, some person belonging to the recovery staff of the Punjab State came to his house and forcibly took this child (Gurmail Kaur) from his custody and put: her in the Nari Niketan at Amritsar. The child was being kept at Amritsar despite his protests and against her own inclination. Despite several applications presented by the petitioner, the child has not been returned to him.

On the other hand, in. reply to his application the Superintendent of Nari Niketan Amritsar wrote back to the petitioner to say that it has been decided by the Managing Committee that as Gurmail Kaur was originally a Muslim girl, she could not be handed over to him. The petitioner in his application to this Court stated that the managing body of the Nari Niketan has no justification for concluding that Gurmail Kaur was a Muslim by birth as nobody knew about her parentage and no enquiry was made by the Managing Committee of the Nari Niketan to ascertain as to who the parents of the girl were.

The petitioner maintainel that Gurmail Kaur had no relatives in the world except the petitioner. It was alleged that the autherities in charge of Nari Niketan had no justification in law to keep Gurmail Kaur with them and the Abducted Persons Recovery Act had no application and moreover it has expired on 30th of November, 1957. As petitioner's several petitions went unheeded, he at last has presented the

present petition to this Court.

3. On 28th of December, 1060, notice was issued to the respondent to produce Gurmail Kaur in this Court. In the written reply the respondent did not deny that Gurmail Kaur was found by the petitioner. The members of her family had been killed during the riots in 1947. She belonged to a Mohammadan family and her former name was Zainab. It was denied that Gurmail Kaur was forcibly taken by the recovery staff. It was alleged that Gurmail Kaur was abducted in March, 1957 by four persons, namely, Gurmail Singh, Mohinder Singh, Jeona and Dogar on the instigation of S. Mian Singh, ex-M. L. A. These accused persons were prosecuted but they were acquitted.

During the pendency of this case, the girl was brought to the Rescue Home, Jullundur and on 9th of October, 1957 she was transferred to Amritsar. It was stated that ever since her admission she is receiving education and she is a student of Government Girls High School and studying in the 7th class and when she was brought she was completely illiterate. It was contended that the girl was being looked after much better at the Nari Niketan than at the house of the petitioner. As she had been abducted and as she wag daughter of Muslim parents, she should be kept at Nari Niketan till she was sufficiently mature to make up her own mind.

4. In support of the written reply which was filed on the 16th of January, 1961, an affidavit was filed by Miss Virmani, Superintendent of Nari Niketan on 30th of January, 1961 in this Court. In the affidavit, Miss Virmani deposed that the petitioner did apply for restoration of the girl but the Managing Committee of the Nari Niketan declined to hand her over to him as it was apprehended that tre girl would not be free, from danger and on being consulted, the girl was willing to remain in the Institution. The affidavit also contained a deposition that it appeared from the enquiry conducted through the recovery police of District Jullundur that Gurmail Kaur belonged to a Muslim family whose parents had been murdered during partition days. This averment is in the nature of a surmise on the part of the deponent.

There is absolutely no proof on the record that Gurmail Kaur belonged to a Muslim family and that her parents had been murdered. It is not known who the parents of the girl were, whether they were Hindus or Muslims, Miss Virmani, however, in her affidavit said that the Pakistan list of abducted persons was checked up but there was nobody who had made any claim in respect of this girl. The affidavit is in parts argumentative and also contains an expression of the opinion of the deponent and I do not think that this part of the affidavit is helpful in any way. An affidavit in order to have any probative value should set forth matters of fact only and not declare the merits of a particular cause and base conclusions on the private opinions of the maker. Affidavit must consist of statement of fact which is being sworn to as the truth. An affidavit which embodies arguments has hardly any evidentiary value. This affidavit is of no assistance as the nature, quality and the source of information are not set forth so as to enable the Court to ascertain whether there is a good foundation for the depositions.

An affidavit is a voluntary ex parte statement jand the affiant is not subjected to cross-examination. The affidavit in question suffers from the lacuna that it does not aver sufficient facts requisite to establish the conclusions sought. Failure to state the facts requisite to establish the contention of the parties renders the affidavit ineffectual. It is, therefore, necessary that the averment should be stated positively

and not as an opinion or a legal conclusion. The averments as to girl's parentage are not based on personal knowledge nor are the details of the information in support of the belief indicated. In the absence of source of information and grounds of belief, the affidavit filed in this Court at a later stage is of no persuasive value.

5. The first question that arises in this case is whether the petitioner has any right or claim to the custody of Gurmail Kaur. She was undeniably brought up by him as a foundling. The petitioner though not a parent, is certainly a person in loco parentis. The petitioner has been discharging the parental duties of making provisions for the child and he has assumed parental character and has been discharging parental obligations. A person stands to a child in loco parent's when he takes it into his home, treats it as a member of his awn family, feeding and supporting it as if it were His own child. The petitioner has discharged all the obligations that fell upon him and has all the rights devolving on a person in loco parent's though not) a father who is a guardian by nature, the petitioner is a de facto guardian by nurture.

It cannot be denied and no attempt has been made to deny, that Gurmail Kaur was a foundling. A foundling means an infant found, abandoned or exposed, without a parent or parents. A foundling is considered a child without parents or whose parents are dead or who has been abandoned by parents who are unknown,

6. Gurmail Kaur is the foster child of the petitioner who has reared her up. 'Foster' means to provide with food, nourish and rear and 'fosterage' is the care of a foster child creating a relationship in consequence of nursing and rearing without their being any tie of blood. A foster father is therefore a person in loco parent's as he has assumed towards a child not his own, the rights and responsibilities belonging to a parent. He holds out the child to the world as a member of the family towards whom he owes the discharge of parental duties. The petitioner has, therefore, put himself in the situation of a lawful parent and has assumed the obligations incidental to the parental relationship.

The rights, duties and liabilities of such a person are not different from that of natural parent, and this status once established is presumed to continue. A person standing in loco parentis is entitled to the custody of the child as against a third person and by virtue of fosterage, he necessarily acquires such power of control over the person of the child and such light of custody over it which belongs to a, natural parent. Of course, it is always open to the Court to deprive a foster parent or even a natural parent of that custody where the welfare of the child demands it. Where the Court gives a child into the custody of another person, a parent, foster or natural, he should be allowed to see the child at reasonable times and occasionally to have temporary custody of the child. But if access to the child is considered to be detrimental to its best interests, it may be denied even to a parent.

7. Fosterage creates relationship which is re-cognised by law of civilised communities and in particular in societies where patriarchal principle had dominated. Ancient Hindu Law recognised more than twelve kinds of sons and in all such cases the father had dominion almost of a proprietary character over his child. Apaviddha was a deserted son having been forsaken by his parents and was out of compassion taken by a person under his Protection and adopted as his son. He may be likened to an unclaimed property which the finder appropriates to himself when its owner has disowned or relinquished his rights over the same.

Apaviddha was an infant or a foundling and the relationship was created by the act of appropriation, as the infant taken was incapable of giving or withholding his assent. The case of a foundling is, therefore, different from that of an adopted child who is given to the adopter by a person who either as the father or as a close relation had the capacity to give him to another person in adoption. Emphasis was, however, laid by the Hindu Law on a male child who according to the prevailing notions secured the parents against the torments of the next. The other notion was that the security of life and property depended upon the number and strength of male members. Nanda Pandita in Dattaka Mimansa recommended affiliation of daughters.

The principles upon which the recognition of subsidiary sons was founded, were also held applicable to secondary daughters, though the occasions for their adoption were rare and the daughters could not serve the temporal purpose for which the sons were adopted. From whichever point the matter may be viewed, a foster parent whether executor or ex more or ex necessitate re, must be recognised to have dominion over the foster child till the latter becomes sui juris. The law must recognise the rights of a foster parent just as it can compel him to discharge the obligations arising out of foster relationship. I am, therefore, of the view that other considerations apart, the petitioner is the rightful person who in law can claim custody of his foster child. In the eye of law the respondent cannot assert a better claim to the custody of the minor, as against the foster parent, except where Court taking into consideration the welfare of the minor entrust the custody to the respondent. This, the Court does, on totally different principles which do not spring from any natural or legal right to the custody.

8. The power of the Court to appoint a suitable guardian of an infant, whether of his person or of his property is coterminous with that of the Sovereign. In England this power had its foundation in the royal prerogative of the King as Parens patriae, father of his country. This power is presumed to have been delegated by the Sovereign to the Chancellor and it by virtue of this power that the Chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians however appointed, removing them for misconduct and appointing others in their stead vide Bouvier page 1391. In Republican countries, the power of parens patriae vests in the State : vide Bouvier page 2448. The same principles received recognition in the ancient Hindu Law. The ruling power was the supreme guardian of all minors whether the natural and legal guardians be living or dead : vide Macnaghten's Hindu Law (4th Edition page 88) : The ruling power, as the supreme guardian is represented by the Courts of law.

This power is paramount to even the rights of the parents: vide Ram Bunsee Koonwaree v. Soobh Koonwaree 7 WR 321 (325). At page 325 Macpherson J. said:

It rests with the sovereign to take care of the infant and his property and to appoint a guardian for the purpose Manu Chapter VIII verse 27 ; Colebrooke's Digest (Madras Ed.) II, 574, 575). It belongs to the Courts as representing the sovereign to protect the rights of the minor.

9. Reference may also be made to Thayammal v. Kuppanna Koundan I. L. R. 38 Mad 1125: AIR 1915 Mad 659(2).

10. The next question is whether the petitioner is justified in invoking the extraordinary jurisdiction of this Court by asking for a writ of habeas corpus in order

to secure the custody of the minor. The right of the parent or the guardian to sue out a writ of habeas corpus for obtaining the custody of the child has always been recognised in England. The grant of the writ is ordinarily not refused on the ground that another remedy by regular proceedings is available. The Court of Chancery would grant the relief where it was moved by a writ of habeas corpus or a petition (Vide Eversley on Domestic Relations, Fifth Edition, p. 420). A parent, guardian or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it by means of the writ of habeas corpus (Halsbury's Laws of England, Third Edition, Volume II, p. 33). The Courts in India have been granting the writ of habeas corpus to a, person entitled at law to the custody of a child against a person who has no right to the minor's custody.

The existence of another remedy under the Guardians and Wards Act is no bar to the issuance of the writ. The relief available under Section 491 and Article 226 of the Constitution is expeditious and it will not be refused on the plea that the applicant should be asked to seek other remedies. This view, which had the support of several High Courts, has now imprimatur of the Supreme Court : vide Gohar Begum v. Suggi Begum : 1960CriLJ164 . This view is in consonance with the principles followed by the Courts in England: vide Halsbury's Vol. II, Third Edition, para 57 P. 33 wherein it is said,

a parent, guardian or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it by means of the writ of habeas corpus. The unlawful detention of a child from a person who is legally entitled to its custody is, for the purpose of the issue of the writ, regarded as equivalent to unlawful imprisonment of the child.

11. Though the writ of habeas corpus is a writ of right, but it is not a writ de course. Its issuance is within the judicial discretion of the Court, the grant depending in all cases on the suitability of the occasion. The paramount consideration in all such cases is the welfare of the minor and there are cases when the courts will be justified in refusing to give the custody of the child to even father if he is considered to be unsuitable person though he is natural guardian: vide Bhola Nath v. District Magistrate Jullundur AIR 1959 Punj 236. In this case however I wish to make it clear that the parental right to the custody of the child is being conditionally interfered with not on account of any misconduct or unsuitability of the foster father but purely in the interest of the child. The petitioner in this case has set a commendable example and has given an excellent account of himself, though occupying a comparatively Jowly and humble status in life, and encumbered with onerous obligations towards his own family of four children, he gave parental protection to a helpless infant and brought her up as his own, and has lavished upon her all the affection which a child could expect from a natural parent. In this matter, I also ascertained the wishes of the child who seems to reciprocate the feelings of affection towards her foster parents in equal degree. It was her wish that she should be returned to her foster parents after she had passed her Matriculation examination. The facilities provided by the Nari Niketan for giving education to the child were not available at home. It was also keen desire of the girl to meet her foster parents and other members of the family as frequently as possible within reason.

I am of the considered view, that it is in the welfare of the child to remain in the Nari Niketan till she has completed her education upto Matriculation standard, and then she should be sent back. to, the foster parents. While she is being kept in the Nari

Niketan, her foster parents and other members of the family should be freely allowed to meet her there, At this stage, I do not consider it advisable to let the petitioner take her back home for short periods.. This request may be made to this Court after some time.

12. Taking into consideration the physical, mental, moral and social well-being of the child, it is to her advantage to stay in the Nari Niketan for some time till she completes her education upto Matriculation standard or attains the age of 1.6 years. I therefore pass the following order.

13. Gurmail Kaur shall stay in the Nari Niketan till she passes her Matriculation Examination or attains the age of 16 years. During the period of her stay in the Nari Niketan, she shall not be taken to a place beyond the jurisdiction of this Court. During this period she shall not be given away in marriage or her marriage arranged without obtaining directions from this Court. Her foster parents, grand parents, brothers and sisters are allowed to visit her in the Nari Niketan freely but subject to the rules of the Institution.