

*Before Mahesh Grover, J.*

**SARBATI,—Petitioner**

*versus*

**PHOOLWATI,—Respondent**

Crl.W.P. No. 79 of 2006

29th February, 2008

*Constitution of India, 1950—Art. 226—After death of father of two minor children living with their grand-mother—Mother claiming custody of children—Custody of minor children—Only on basis of evidence—Paramount consideration—Welfare of children—Children getting love and affection at their grand-parent's house—Grand-father already transferring 20 acres of land in favour of his grandson— Children feeling comfortable with their grandmother and house they are living—Extremely traumatic for children to force to leave house of their grandmother and live with their mother with whom they never lived for many years—Petition dismissed.*

*Held*, that the children are in the loving care of their grand-mother and have been staying with her ever since they were born. The love and affection which the children were getting at the house of their grand-parents is also reflected from the fact that the grand-father, who was owner of 24 acres of land transferred 20 acres out of it in favour of his grand-son and gave four acres to the petitioner. The children are aged 11 years and 9 years. The petitioner seemingly made some attempts for the custody of her children, but then chose to settle the matter by compromising in the presence of Panchayat on 29th July 2005 and before the police.

(Para 22)

*Further held*, that apart considering the welfare of the minor children which is the paramount consideration that ought to weigh with the Court at the time of deciding such questions, it appears that it will be extremely traumatic for them to be forced to leave the house of their

grand mother to which they are accustomed to and which dwelling was destined to be their natural home and which despite quirk of fate has remained as such, to live with their mother with whom they never lived for the many years.

(Para 23)

*Further held*, that I do not deem it a fit case where this Court should interfere in the proceedings under Article 226 of the Constitution of India to grant the custody of the minor children to the petitioner, especially in the given set of circumstances of the case where the Court is of the opinion that it will be against their interest to remove them from the environment where they are safely enconseed,

(Para 25)

**MAHESH GROVER, J.**

(1) This petition under Article 226 of the Constitution of India has been filed by Smt. Sarbati widow of late Shri Kuldeep Singh, resident of Village Badhwar, Tehsil and District Hisar for issuance of a writ in the nature of habeas corpus directing respondent Smt. Phoolwati to release minor children, namely, Ashish Kumar and Ms. Pooja, from her illegal custody.

(2) The petitioner has averred that she is the mother and natural guardian of the aforesaid minor children. Her husband-Kuldeep Singh and father of the children, who was the only son of his parents, died during the life time of his father-Dariya Singh. He had six sisters and all of them are married and are settled at various places. After the death of Kuldeep Singh, Dariya Singh, his father, executed a registered will dated 4th November, 2004 bequeathing 5/6th share of his property in favour of grand-son, Ashish Kumar, and 1/6th share in favour of the petitioner. the daughters of Dariya Singh were specifically excluded from the inheritance. Dariya Singh also expired after some time of the death of Kuldeep Singh.

(3) The petitioner has alleged that she was thrown out of the house at the instance of her six sisters-in-law, but the minor children, namely, Ashish Kumar and Ms. Pooja remained with their grand-mother, i.e., the respondent and they are still staying with her.

(4) It has further been averred that a civil suit for declaration was filed on 19th September, 2005 by the sisters-in-law of the petitioner challenging the aforesaid will. However, the same is said to have been acted upon and necessary mutation in favour of Ashish Kumar has been entered by the revenue authorities.

(5) Upon notice, respondent-Smt. Phoolwati appeared and hotly contested the petition. She disputed that the minor children's custody cannot be termed as illegal as she was their grand-mother. In her written statement, she averred that since the death of her son-Kuldeep Singh, the children were staying with her and are being reared with great love and affection, whereas the petitioner had herself abandoned them. She further stated that both of them were admitted in Shiksha Kiran Public School, Surya Nagar, Hisar and with the active assistance of Ram Rattan and Sarjit, who are her sons-in-law, their educational and other needs are being taken care of. The respondent has alleged that the petitioner made complaints to the police on 20th June, 2005 and 30th June, 2005 at the instance of her brother. The police summoned the children along with her and after verifying and ascertaining the will of the children, who stated that they wanted to live with the grand-mother, the matter was got compromised. She has referred to the report of the concerned Sub Inspector, which is Annexure R2.

(6) The respondent has stated that she is contesting the suit filed by her daughters challenging the will in favour of the minor, Ashish Kumar and the Court has appointed her as his guardian to safe-guard his interests during the proceedings. She has further stated that a written statement has been filed by her defending the will in favour of the minor child.

(7) In the aforesaid back-drop of the case, the present controversy is being answered.

(8) At the out-set, learned counsel for the respondent raised a preliminary objection saying that a writ of habeas corpus cannot be issued as the minor children cannot be said to be in the illegal custody of the respondent. They are living with her since the time they were born as Kuldeep Singh, their father, was residing in the same house. After his death, the petitioner abandoned her matrimonial home and she

along with her brother is interested in grabbing the share of Dariya Singh, which has been bequeathed in favour of minor-Ashish Kumar. In this view of the matter learned counsel for the respondent contended that the respondent being their grand-mother, the custody of the minor children cannot be termed to be illegal and the present writ petition is not maintainable in view of the law laid down by the Supreme Court in **Sumedha Nagpal versus State of Delhi and others, (1)**.

(9) On the other hand, learned counsel for the petitioner argued that the writ in the present form is maintainable and in support of his contention, he placed reliance on **Gohar Begum versus Suggi alias Nazma Begum and others (2)**, **Yendamuri Veeranna versus Yendamuri Satyam and others (3)**, **Mrs. Isabell Singh versus Ram Singh and another (4)**, and **Mumtaz Begum versus Mubarak Hussain (5)**.

(10) I have heard the respective contentions and have perused the record.

(11) The facts of this case reveal a serious dispute regarding the custody of the minor children. On the one hand, the petitioner, who is the mother, claims their custody, while, on the other hand, the respondent, is the grand-mother, claims that the children were born in the house where she resided and after the death of her son-Kuldeep Singh, they have continued to reside with her and it was the petitioner, who had abandoned the matrimonial home leaving the children behind and it is now only the property which has been bequeathed in favour of minor child-Ashish Kumar to the extent of 5/6th share by her husband-Dariya Singh, who was the grand-father of the children, that has motivated the present petition. Dariya Singh is also said to have taken care of the petitioner by giving her 1/6th share in the property.

(12) The question, therefore, would be that whatever may be the circumstances, can the grand-mother with whom the children have been residing ever since they were born, be said to be holding the

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(1) (2000) 9 SCC 745

(2) AIR 1960 S.C. 93

(3) AIR 1948 Madras 10

(4) AIR 1985 Raj 30

(5) AIR 1986 M.P. 221

children in illegal custody against their wishes and contrary to their interest.

(13) I am afraid, the answer necessarily has to be in the negative.

(14) Further, the maintainability of a writ petition may also be a moot point. In a writ petition, which is to be decided on the basis of the averments and the affidavits which are produced before the Court, it would be seemingly a difficult question to answer when the controversy is mired deeply in facts where the children apparently become pawns to be moved around at the whims and fancies of the players, who have chosen to make their lives as chess-boards.

(15) In my opinion, the question regarding the custody of the minor children, which has arisen in the present case, can only be answered on the basis of the evidence which can substantiate the facts and the counter-facts as alleged in the present case.

(16) In **Gohar Begum's case (supra)** relied upon by the learned counsel for the petitioner, the facts were entirely different. There, the mother was pitted against her maternal aunt. Both the parties in their case belonged to Muslim community and were singing girls by profession. The appellant before the Apex Court in that case was living in the company of her aunt, who derived pecuniary gains by keeping her in the company of two persons. Thereafter, she is said to have given birth to a girl and started living exclusively in the company of one man. Thereafter, two more children were born to the appellant. One minor child of the appellant therein was removed by her maternal aunt and taken to Pakistan for a short interregnum and thereafter, when she returned back to India, she refused to hand over the child to the mother. It was in those circumstances that the question was answered that the proceedings under Section 491 of the Cr.P.C., 1898 were maintainable and that the child was considered to be in illegal detention within the meaning of that section.

(17) Similarly, in **Mrs. Isabell Singh's case (supra)**, the facts were entirely different as, there, the parties had divorced each other

in Florida (United States of America) and while parting ways, an additional clause was added in the agreement that the children will not be removed by either of the parties from the State of Virginia except with the written consent of the other spouse. The children were thereafter removed by the father from the custody of the mother and brought to India secretly without the consent of their mother.

(18) Likewise, in **Mumtaz Begum's case (supra)**, their Lordships of Madhya Pradesh High Court held that the child being only of four years, was in dire need of motherly affection and love and while giving the custody to the mother, it was also observed that the father cannot be denied the access to the child.

(19) But, this is not to say that the High Court under Article 226 of the Constitution of India is helpless and cannot entertain a petition in such like circumstances where custody of the minor child or children is prayed for.

(20) The power under Article 226 is wide enough and it can neither be enclosed in straining-jackets or set at the mercy of any artificially created bar, as the Constitution of India never intended it to be that way.

(21) The test to be applied is always on the basis of the facts of each case which may warrant interference under Article 226 or compel the High Court to restrain its hands so as to desist from exercising such power.

(22) As detailed above and revealed from the facts of the present case, the children are in the loving care of their grand-mother and have been staying with her ever since they were born. The love and affection which the children were getting at the house of their grandparents is also reflected from the fact that the grand-father, namely, Dariya Singh, who was owner of 24 acres of land, transferred 20 acres out of it in favour of his grand-son, namely, Ashish Kumar and gave four acres to the petitioner. The children are aged 11 years and 9 years. The petitioner seemingly made some attempts for the custody of her

children, but then chose to settle the matter by compromising in the presence of Panchayat on 29th July, 2005 which is reflected from Annexure R1 and before the police as is evident from Annexure R2. Learned counsel for the petitioner has not denied this fact.

(23) That apart, considering the welfare of the minor children which is the paramount consideration, that ought to weigh with the Court at the time of deciding such questions, it appears that it will be extremely traumatic for them to be forced to leave the house of their grand-mother to which they are accustomed to and which dwelling was destined to be their natural home and which despite quirk of fate has remained as such to live with their mother with whom they never lived for many years.

(24) This Court, during the course of proceedings, also made endeavour by directing the children to be present in Court and ascertained their views and they were apparently comfortable with their grand-mother and the house they were living. The report of the District Judge, Bhiwani was also sought so as to ascertain as to whether their education is being taken care of and whether the school, namely, Sainik High School, Vidya Nagar, Bhiwani where they were presently studying, was suitable enough to which the District Judge opined that the said school had adequate infrastructure and the same is recognised by the Board of School Education, Haryana and that the children were present when the school was inspected by him and both of them were studying in Class VIIIth and Class VIth respectively.

(25) Having regard to the aforesaid, I do not deem it a fit case where this Court should interfere in the proceedings under Article 226 of the Constitution of India to grant the custody of the minor children to the petitioner, especially in the given set of circumstances of the case where the Court is of the opinion that it will be against their interest to remove them from the environment where they are safely enconseed.

(26) For the reasons mentioned above, this petition is dismissed.

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**R.N.R.**