

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

W.P.(CRL) 294/2008

Date of Decision : March 03, 2008

DEEPAK AGNIHOTRI

Through

Petitioner

**Mr. V.M. Issar with Mr. Vishesh
Issar, Advs.**

versus

THE COMMISSIONER OF POLICE and ORS.

Through

Respondent

**Mr. Saleem Ahmed with
Mr. Ehtesham Hashmi, Advs. for
State ASI Jai Singh, P.S. Paschim
Vihar**

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE P.K. BHASIN

VIKRAMAJIT SEN, J. (Oral)

1. This Petition under Article 226 of the Constitution of India prays for the issuance of a Writ of Habeas Corpus directing the Respondents, mother of baby girl Sanandana, for production of the baby girl. The Petition discloses that the Petitioner, Deepak Agnihotri, was married to Respondent No.3, Namita Agnihotri, on 29.1.2005 according to Hindu rites and ceremonies. Sanandana was born from this wedlock on 3.9.2006. It has been asseverated in the writ petition itself that as far back as on 30.11.2006 Namita set up residence with her younger married sister. It has been pleaded that she had earlier made a demand to her husband to arrange for a separate residence for themselves. The Petition discloses that to celebrate New Year day Namita, along with Sanandana, visited Deepak's house for the first time. There is an allegation that Namita left Sanandana in the matrimonial home in the third week of January, 2007 and thereafter did not care to meet the child for about seven months. It appears that on 25.8.2007 Namita took custody of Sanandana from her husband's home. On the occasion of the first birthday of Sanandana Namita is stated to have returned to her matrimonial home. However, on 4.11.2007, Namita allegedly took Sanandana away and left her in the care of her matrimonial grand-parents in Aligarh. There are allegations to the effect that Sanandana was being neglected by her matrimonial grand-parents, whilst Namita has been attending her job and living

with her sister in Geeta Colony, Delhi. According to the Petitioner, with great difficulty and a lot of persuasion, Sanandana was brought back to Delhi; unfortunately the date is not given. The Petition further narrates that in December, 2007 Deepak Agnihotri, along with his family members as well as Sanandana, were grievously hurt in an accident which occurred on their visit to Jaipur. While they were under treatment, Namita is stated to have left the matrimonial home on 27.12.2007. According to the Petitioner Sanandana remained in his care from 22.11.2007 to 15.2.2008. On the latter day the local police allegedly forced Deepak to handover the custody of Sanandana to Namita. The Petition also states that Sanandana has now been kept in some unknown place. The gravamen of the argument of Mr. Issar, learned counsel for the Petitioner, from the very beginning, is that the Petition is for the custody of the child.

2. At the very threshold we had conveyed to learned counsel for the Petitioner our view that it would not be appropriate to exercise the extraordinary powers reposed on the Writ Court in the circumstances of this case. Mr. Issar, however, relies on Smt. Nandita Virmani -vs- Raman Virmani, 1983 CrL. L. J. 794. We have carefully perused the Judgment but in our view it is of no assistance to the Petitioner. So far as the factual matrix was concerned, an understanding had been reached between the mother and the father in that case pertaining to visitation and custody of their minor son. It appears that the father had reneged on that understanding. The petition for Habeas Corpus was filed in those circumstances. The Division Bench, inter alia, underscored the fact that Section 6 of the Hindu Minority and Guardianship Act, 1956 (Minority Act for short) postulated that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. While drawing a distinction between guardianship and custody of a minor, the Division Bench clarified that Section 6 does not stipulate that custody of a child above the age of five years would invariably lie with the father. The Division Bench further elaborated that in custody matters it is the welfare of the child which is of pre-eminence; it would prevail over perceived individual rights of the parents. At no stage did the Division Bench opine that the jurisdiction of the Guardians and Wards Act, 1890 (Guardians Act for short) or of any matrimonial court exercising jurisdiction under respective Sections dealing with custody rights, must give way to Habeas Corpus proceedings. It is trite that wherever alternate or equally efficacious proceedings are available under statute a writ court should direct the parties to avail of such remedies.

3. The interplay between a Habeas Corpus Petition and a custody action under a statute, essentially seeking a decision on which of the parents has the right to the custody of an infant, has been considered in detail by the Supreme Court in Sumedha Nagpal -vs- State of Delhi, IV (2000) CCR 48(SC) = JT 2000(7) SC 450. The mother had filed a writ of Habeas Corpus on the allegation that she had been deprived, through deceit, of the care and custody of her two year old child. The contention on behalf of the mother was that since it was the petitioner who was statutorily entitled to the custody of the child, the writ court should not shirk its task in ordering restoration of the custody of the minor to the mother. Their Lordships clarified that the rights of the parties would always be subservient to the welfare of the minor. The writ was dismissed with leave to file appropriate proceedings under Section 25 of the Guardians Act read with Section 6 of the Minority Act. In Saihba Ali -vs- State of Maharashtra, 2003 SCC(Cri) 1675 the Supreme

Court reiterated the position that a petition under Article 32 of the Constitution of India was not maintainable. In similar vein, in Sarita Sharma -vs- Sushil Sharma, (2000) 3 SCC 14, their Lordships held that the High Court should direct the parties to initiate proceedings for a full-fledged inquiry under Section 6 of the Minority Act, although in the interregnum it ought to have restored the status quo ante. Their Lordships reiterated that a female child should be allowed to remain with the mother so that she can be properly looked after.

4. There may be cases where one of the parents forcibly or deceitfully snatches a child from the lawful custody of one of the other estranged parents. If the writ court is immediately petitioned by means of a Habeas Corpus writ for restoration of status quo ante, such an order should usually be passed. There may also be instances where it is palpably obvious to the Court that the custody of one of the parents is obviously illegal and in such an event the Writ Court should not hesitate to interfere. Even in these cases it should be a temporary or interim arrangement, leaving the parties to approach the competent Guardian Court to determine which of the two adversarial sides is better placed or suited or equipped for bringing-up a child.

5. Returning to the facts of the present case it is clear that differences between Deepak and Namita have been festering for several months. If the Petition is to be believed Sanandana has been shuttling back and forth from her father and his family on the one hand and her mother and her family on the other. The infant girl, however, is only 1 years of age and, prima facie, should be in the custody of her mother. Whether such custody is congenial for her welfare is a matter which cannot be decided without a thorough probe by the Court. Habeas Corpus proceedings are not suited for such scrutiny. The writ petition is accordingly rejected at the very threshold. Liberty is granted to the Petitioner to initiate appropriate proceedings, which, if commenced, shall be decided without being swayed by any of the observations made by us hereinabove.

MARCH 03, 2008

Sd./-
VIKRAMAJIT SEN,J
Sd./-
P.K. BHASIN,J