

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(CRL) 3062/2006 & CrI. M.As. 14690/2006, 924/2008

Israt Jahan Tabassum Petitioner
Through Ms. Meenakshi Lekhi, Adv.

versus

Union of India & Ors. Respondent
Through Mr. Kailash Vasudev, Sr. Adv.
with Mr. D.S. Chauhan, Adv. for
Respondent No.4
Mr. Baldev Malik, Adv. for UOI

Date of Hearing : March 04, 2008

Date of Decision : March 07, 2008

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE P.K. BHASIN

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| 1. Whether reporters of local papers may be allowed to see the Judgment ? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

J U D G M E N T

1. Israt Jahan Tabassum (hereinafter referred to as Petitioner/Mother) has filed this Habeas Corpus Petition against her ex husband, Vijay Alreja (hereinafter referred to as the Respondent/Father) praying for the production of their minor daughter, Avantika and thereafter for restoring the custody of Avantika to her mother. Avantika was born

on 24.1.2002 at Dhaka, Bangladesh. She is presently about six years old. It has been asseverated in the Petition that the Respondent/Father had converted to Islam faith and that they had got married under Muslim rites on 14.10.1997.

2. In paragraph 4 of the Petition it has been pleaded that in 2005 the Respondent/Father “fraudulently and by misrepresenting the petitioner procured an Indian Passport for the minor child”. The case of the Respondent/Father is that the Petitioner/Mother herself wanted an Indian Passport for the child. The Petition thereafter discloses that Avantika was removed by the Respondent/Father from the care and custody of the Petitioner/Mother and brought to India on 17.7.2006 which resulted in the Petitioner/Mother following them to Delhi on 25.8.2006. The Petitioner/Mother alleges that Avantika “was sent to a Boarding School and the petitioner is not allowed to have the custody and care of the minor child which is against the interest and welfare of the child. The minor child is in a pathetic condition and the petitioner, a helpless mother, not allowed to have custody and care of the minor child. The interest and welfare of the minor child is best served in the custody and the care of the mother and not at the Boarding

School". The Petition was filed in December, 2006 when Avantika was in Delhi for her Winter Vacations. It is stated in the Petition that the Petitioner/Mother is "entitled to have the custody of her female child upto the child's puberty according to Muslim Sharia and Family Laws and enforceable in Bangladesh. Even according to Indian Muslim Law the Muslim Women is entitled for the custody of the minor child upto the age of child's puberty. Any contravention of this rule constitutes gross violation of Child Rights recognized in Convention on Child Rights (CRC)".

3. We shall briefly refer to some of the documents filed by the parties. A Document dated 10.7.2006 signed by the parties records the factum of Avantika being an Indian citizen holding Indian Passport No.F-0801181. This document speaks of the resolve of the parents to formally separate from each other. A letter of even date, again signed by both parties, seeks admission to Pathways World School, Gurgaon, G.D. Goenka World School, Sohna and St. Helen's Secondary School, Kurseong. In the first two requests the address of the parties is of Bangladesh, whereas in the

application of St. Helen's Secondary School the address is of B-72, Lajpat Nagar-II, New Delhi.

4. The first question that arises before us is whether a writ of Habeas Corpus is maintainable in the factual matrix of the case. In this context our attention has been drawn by Ms. Lekhi, learned counsel for the Petitioner, to ***Gohar Begum -vs- Suggi***, AIR 1960 SC 93. The Judgment is of no avail to the Petitioner/Mother for the reasons that the custody battle was between the natural mother and the maternal grand aunt of a five year old Muslim girl. It was in this context that their Lordships observed that according to Mohammedan Law “the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of S.491”. It would be useful to clarify that the legal framework which had existed in ***Gohar Begum*** does not endure any longer since Section 491 of the Code of Criminal Procedure, 1898 has been omitted and finds no place in the Code of Criminal Procedure, 1973. The dispute before us is between the

Petitioner/Mother and the Respondent/Father. It is nebulous and obscure as to whether the Mother did not consent for the admission of her daughter, Avantika in St. Helen's Secondary School, Kurseong. So far as the Respondent/Father is concerned, he has pleaded that the admission was with the consent of the Petitioner/Mother, thereby indicating that her custody was shared equally between the two parents.

5. We recall the law enunciated by the Apex Court in Mrs. *Elizabeth Dinshaw -vs- Arvand M. Dinshaw*, AIR 1987 SC 3 where their Lordships yet again reiterated that in disputes pertaining to the custody of a minor child “the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would serve the interest and welfare of the minor”. The writ petition filed by the mother, who had been granted the custody of the minor in the course of divorce proceedings before a competent court in the United States, was allowed. It was also observed that it was the bounden duty of courts in all countries to ensure that the parent, who had illegally violated custody orders, did not gain any advantage from his wrong doing.

6. 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 alleging that she had been deceitfully deprived of the custody of her two year old child and that since she was statutorily entitled to the custody of the child, therefore the writ court ought not to “shirk” its task in ensuring status quo ante. 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 initiate proceedings under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardianship Act, 1956. In *Saihiba 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”.

7. 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 clear 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 exercise its extraordinary powers. Even in these cases it would be expedient to ordain 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.

8. So far as the facts of the present case are concerned, we are unable, at this stage and in these proceedings, to accept the Petitioner/Mother's allegation that she was tricked into signing the document seeking admission of Avantika to St. Helen's Secondary School, Kurseong; or that Avantika's Indian Passport had been made under false pretences. Such highly contentious facts can properly be decided only after the reception of evidence. In our opinion, however, these disputes ought not to

engage our attention since the case of the Respondent/Father is that admission of Avantika had been obtained in St. Helen's Secondary School, Kurseong by consent of both parents. As we have already observed the only inference that can be drawn is that the child is not in the exclusive custody of her Father/Respondent. It may also be useful to refer to the decision of the Division Bench in *Smt. Nandita Virmani -vs- Raman Virmani*, 1983 CrL. L. J. 794. The Division Bench had highlighted the distinction between the Guardianship and the custody of a minor clarifying that whilst the guardianship may remain with the father, custody could be that of the mother.

9. We are fully mindful of the tenets of Muslim Law on the aspect of the custody of a female child. Where there is no friction between parents, the question of who has their custody is wholly superfluous. Custody becomes relevant only where a dispute arises between the parents; even in such cases they may jointly agree that their children should receive education in a residential school. Wherever such a decision is taken the only question then arises how the vacations of the children are to be shared. Custody, therefore, does not become a contentious or debatable issue. The dispute would arise in the event that

either of the parents decides to novate upon the arrangement in such a way as to give one of the parents exclusive custody of the children. It seems to us that this is what has happened in the case before us. Prima facie, admission had been done with the consent of both parties, leading to the inference that both parties share custody of Avantika. This arrangement does not violate Muslim Law. Therefore, issuance of a writ of Habeas Corpus would not be an appropriate course of action.

10. We must note that the Petitioner/Mother had expressed her decision to remain in India and care for Avantika personally. She had stated that if the Respondent/Father contributes a sum of money equal to the School Fee being paid by him at St. Helen's Secondary School, Kurseong, together with travelling expenses, she would meet the rest of the expenses through her own sources. We had roughly quantified these expenses to be approximately Rupees Ten Thousand per month. However, there is yet another imponderable inasmuch as the Petitioner/Mother is a citizen of Bangladesh and her continued residence in India cannot be presumed. The personal care of a parent has no substitute. Loving and congenial surroundings in a home would usually be preferred to life in a residential school. The statute

also recognizes that the solicitude of the Petitioner/Mother is incomparable with any other. There is nothing on record, however, to indicate that Avantika is unhappy in the residential school where she is presently receiving her education. As we have already observed, on a prima facie view we cannot at once come to the conclusion that the joint custody of Avantika is contrary to Muslim Law. If circumstances now exist, such as make it preferable to change the existing arrangement, there may be no alternative but to handover custody of Avantika to her Mother. These circumstances would, however, have to be proved before the proper legal Forum under the applicable law. We are not convinced that the situation has changed so appreciably and drastically that the orders in writ proceedings have become essential.

11. We are concerned by the fact that due to the present hearings Avantika has not returned to St. Helen's Secondary School, Kurseong. The present Academic Year comes to an end very shortly and any further delay in her rejoining St. Helen's Secondary School, Kurseong is bound to have a deleterious effect on her education. We, therefore, direct both the parents, namely, Israt Jahan Tabassum and Vijay Alreja to ensure that

Avantika is returned to St. Helen's Secondary School, Kurseong within seven days from today. The Respondent/Father shall make necessary arrangements and meet the expenses of the Mother if the latter is desirous of accompanying them to Kurseong. Failure to do so may leave no room but to conclude that the offending parent is motivated by selfish and egoistically reasons rather than for the welfare of Avantika. Having said so, we vehemently and unequivocally clarify that we have steered clear, in the present Habeas Corpus proceedings, from taking a final and definitive decision on this delicate dispute. If either of the parents should feel compelled by their concern for Avantika to seek a change in her custody and schooling arrangement, proper legal proceedings may be initiated. In such an event, the Court will not be influenced by any observations that have been made by us hereinabove. Next Academic Year shall commence at least a couple of months from now, thereby rendering a judicial decision in the matter within that period just and convenient.

12. We would request the Principal, St. Helen's Secondary School, Kurseong, Darjeeling West Bengal to condone the

delay that has been caused in Avantika's rejoining the School for the present term.

13. Learned counsel for the Respondent has prayed for orders with regard to the continued stay of the Petitioner/Mother in Lajpat Nagar, New Delhi. The Orders passed on 14.2.2007 are relevant. However, thereafter the Respondent has divorced the Petitioner. The situation has changed drastically. We do not think it expedient to pass any orders in these Habeas Corpus proceedings, granting leave to the parties to initiate appropriate proceedings, if so advised.

14. Petition is disposed of in these terms.

15. A copy of this Judgment be given DASTI under the signature of the Court Master.

(VIKRAMAJIT SEN)
JUDGE

MARCH 07, 2008
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(P.K. BHASIN)
JUDGE