

THE HIGH COURT OF TRIPURA
AGARTALA

Crl. Petn. No.09 of 2015

Smt. Sreeparna Banik (Saha),
W/O. Sri Ankur Saha,
D/O – Sri Pradip Banik,
Resident of 59 Central Road, Agartala,
P.O. – Agartala,
P.S. – West Agartala, District – West Tripura.

..... *Petitioner*

- Vs. -

1. Sri Ankur Saha,
S/O – Lt. Amar Saha,
Resident of – Saha Gas Traders, Haradhan Sangha,
Lake Chowmuhani, Krishnanagar, Agartala,
P.O. – Agartala, P.S. – West Agartala,
District – West Tripura.

..... *Respondent*

2. The State of Tripura,
Represented by the Secretary to the
Government of Tripura,
Home Department,

..... *Proforma Respondent*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the Petitioner : Mr. S. Mahajan, Advocate.
Ms. B. Sur, Advocate.

For the respondents : Mr. S. Lodh, Advocate.
Mr. A. Pal, Advocate.

Date of hearing & : 13.10.2015.
delivery of
Judgment & order

Whether fit for : Yes.
reporting

JUDGMENT & ORDER (ORAL)

By this petition the petitioner has challenged the order dated 17th March, 2015 passed by the learned Sessions Judge, West Tripura, Agartala.

2. Briefly stated the facts of the case are that the petitioner (hereinafter referred to as the 'mother') was married to the respondent No.1 (hereinafter referred to as the 'father') on 27.02.2009. Differences arose between husband and wife. In this case, this Court is only dealing with the issue as to who should be granted the custody of the child and therefore, I am not going into the allegations made by the husband and wife against each other. There is no dispute that in the month of August, 2013, the mother left the matrimonial home along with her child. It is disputed whether the mother left over own accord or whether she was forced and compelled to leave the matrimonial home. This matter is not being decided here. A few days later, the mother of the respondent i.e. grandmother of the child took the child back to the father's home. Thereafter, a notice was issued on behalf of the wife to the husband on 19.08.2014 leveling charges and seeking custody of the child.

3. Thereafter, the mother filed a petition under the provisions of the Protection of Women from Domestic Violence Act, 2005 (*hereinafter referred to as the Act*) in December, 2014. Many reliefs were claimed by the wife but in this petition we are only

concerned with the application filed by the wife under Sections 12, 21 and 23 of the Act praying that she may be granted custody of her minor daughter. The learned Magistrate to whom the case was transferred passed an *ex-parte* order directing the husband to handover the child to the wife and also by interim order directed that till the case is decided the custody of the minor daughter will remain with the mother.

4. The main reason which weighed with the learned Magistrate while passing the order was that a child of such tender age needs the love, care and affection of her parents especially the mother. The learned Magistrate found that the female child is only 4 years old and, therefore, requires the care and nourishment of the mother. Even from the facts which were alleged in the complaint it was apparent that the child had been living with the father for more than one year and four months prior to the date of the order being passed. On 16.8.2014 a notice had been sent by the wife-petitioner to the husband in which the wife had complained that the child had been taken away from her on 15.8.2013. Thereafter in response to this notice the husband sent a reply in which it was mentioned that for 33 days the child had remained with the mother on various dates.

5. In the reply to the notice, it was also stated as follows:-

"5. Regarding the question of restoring custody, my client states that welfare of the minor child is of paramount consideration. In the demand notice, no where it is mentioned as to how the welfare of the child will be benefitted in the custody of the notice giver. The notice giver, has not given any details regarding her monthly earning or as to how she proposes to maintain the expenses of schooling, fooding, studies and other expenses of the child which are essentials for the welfare of a minor child."

6. The learned Magistrate was absolutely right in coming to the conclusion that a child needs the love and affection of both the parents. Parents who are adults may fight with each other. Parents have their egos and because of their egos they do not want to compromise with each other. The parents may do anything to each other but the child has the right and in fact, the requirement of every child is that if both parents are alive the child should receive the love and affection of both the parents.

7. I am also of the considered view that a female child of the age of three or four years should normally stay with the mother. However, while passing orders with regard to transfer of custody of children the Court must not only have a legalistic approach but must also have a humane approach and should understand human problems. In any case of custody of a child paramount importance must be given to the interest of the child. The child cannot be made a scapegoat due to the inability of the parents to live with each other. Where the learned Magistrate went wrong was to direct that the custody of the child be handed over immediately to the mother that too by an *ex-parte* order. The

young girl who is the subject matter of this litigation, is a living human being. She has emotions. She has her likes and her dislikes. She is not an inanimate object like a pen or a pencil. She is not an animal. Even an animal who lives with one human being develops love and affection for that human being. The child had been living with the father for more than one year. Only for a few days the child had lived with the mother. The girl child is only 5 years old.

8. The husband filed an appeal challenging the said order before the learned Sessions Judge, West Tripura, Agartala. The learned Sessions Judge called the parents and found that the minor girl had been in the exclusive custody of the father since 26.8.2013. He talked to the child and found that the child did not want to go with the mother and in fact was not going near the mother at all. He, therefore, held that it is not possible to order restoration of the custody of the child to the mother. Further, the learned Sessions Judge directed that the appellant i.e. the husband will take necessary steps in consultation with the wife so that she can visit her daughter twice in a month and the time and place to be decided by the parties through their engaged counsel.

9. The learned Sessions Judge may have been right in taking into consideration the views of the child but the learned Sessions Judge was absolutely wrong in leaving it to the parents to

decide what are the visitation rights of the mother. It is for the Court to lay down the visitation rights because the parties may never come to an agreement with regard to the visitation rights and that would lead to further chaos.

10. I myself had called the parties as well as the minor child to my Chamber. I found that both the husband and wife had taken very rigid stands and they were not willing to compromise the matter under any circumstances. Both did not want to give in even an inch to settle the matter. As far as the minor girl is concerned, I found her to be an extremely intelligent girl. She could converse with me confidently in '*Hindi*' without the aid of any interpreter. No doubt she said that she did not want to go with her mother but when I questioned her in private in presence of the Court staff she also admitted that she had been told by her father and grandmother to state that she did not like the mother and did not want to go with the mother. This clearly shows that she was tutored. Where parents fight with each other these things are bound to happen. If the child is in the custody of the mother the mother will tutor the child and child will start hating the father. In the present case the situation is just reverse. A child of 4/5 years is totally under the influence of the father and family members of the father with whom the child is residing. She will in Court say only what she has been told to say at home.

11. Here comes the role of Judges who handle such matters. A child of such tender age has to be handled in a manner where the child finds a friend in the Judge. First of all the consultation with the child should be done in a language which the child understands. Secondly, the child should never be called to the Court room but only to the chamber. Thirdly, the Judge must make an effort to build up a relationship with the child where the child starts trusting the Judge. It is the duty of the presiding officer to find out the truth from the child. Unfortunately, neither the learned Magistrate nor the learned Sessions Judge tried to do this.

12. When I had won over the confidence of the child in chamber I found that not only she is very confident but she was a very honest and truthful child. Any child by nature is honest. It is society which turns a child dishonest by the time the child grows up. Why should the child be denied the love of her mother? I have already held that the child is not an inanimate being and the Magistrate was wrong in transferring the custody of the child to the mother all of a sudden. However, I at the stage of initial hearing felt that first of all an attempt should be made to build up a strong loving relationship between the child and the mother where the mother gets love and affection of the child and the child learns how to love and respect the mother. The father and the family members were also clearly warned that if on the next occasion when the child comes to Court I find that she states that

she hates her mother then I might think of taking away the custody of the child from them immediately because if the child is taught to hate the mother then the child is not being brought up in a proper manner.

13. Even if the child is living with the father, the father and the family members of the father should tell the child to love and respect the mother. Just because the husband and wife are fighting does not mean that the child should be taught to hate her mother. A child who is taught to hate her mother can never turn out to be a good human being. In any society the most important trait of any person, be that person howsoever high or howsoever low, is that the person should be a good human being.

14. The most important aspect is that the best interest of the child has to be kept in mind while passing any order with regard to custody, visitation rights etc. Legally speaking when the child is a female and only 5 years of age the mother has the legal right to get the custody of the child.

15. Keeping in view the aforesaid facts and circumstances, on 24.06.2015, a detailed order was passed, the operative portion of which reads as follows :

That w.e.f. 05.7.2015 the father shall take the child to the house of the mother on every Sunday at 9.00 a.m. and bring back the child at 6.00 p.m. This will go on for the entire month of July, 2015 till 2nd August, 2015 and thereafter the child shall be

produced before me in my chamber on 5th August, 2015 at 4.30 p.m. so that the child does not miss school on that day.

16. On 27th July, 2015, this order was modified as follows:-

"That w.e.f 1st August, 2015 on every working Saturday of the High Court the child shall be brought to the High Court at 10.30 a.m. The child shall be handed over to Ms. Sima Dutta the Private Secretary to this Court who shall then take the child to the auditorium. The mother shall meet the child in the auditorium and the child will not be handed over directly to her. At 1.00 p.m. Ms. Sima Dutta will ensure that the child is handed over to the father. Ms. Sima Dutta is also requested to introduce the child to two/three other lady Officers of this Court and in case Ms. Sima Dutta is on leave on any of the days one of the other lady Officers shall see that the child is well looked after. In case Saturday is not a working day then on the Friday prior to the Saturday the child will similarly be brought to the Court at 2.00 p.m. and shall remain till 5.00 p.m. In case auditorium is not available then the child will meet her mother in alternative arrangement as may be found suitable by the Court officials."

17. Even today, the child is only about 5 years old. She is a female child. It is in her interest to stay with the mother. Over the period of last 2/3 months she has met her mother on a number of occasions. It has been reported to me that though the child was initially reluctant to meet the mother but after 10/15 minutes she gets involved with the mother and start playing with the mother. It is more than apparent that even now she is being tutored by her father and his family members to speak against the mother. I have observed that she has become aggressive in her behaviour. This is totally different to what her initial behaviour was. The only presumption I can draw is that the father and his

family members are trying to tutor the child against the mother. I had clearly mentioned in my earlier order that it is the duty of the parent with whom the child is living to ensure that the child respects and love the other parent also. This has unfortunately not happened. A small female girl needs the attention of her mother. The grandmother cannot provide the love and affection which a mother can provide. On behalf of the father, it was contended that the mother is not earning. It was stated on behalf of the mother that though she was not earning when the petition was filed but now she is working in a school. There is no manner of doubt that the mother is a Post Graduate. She is an educated lady. The husband is a rich businessman and it is his duty to maintain the child and he can pay the expenses of the child even when she is living with the mother. I am clearly of the view that now the time has come to handover the custody of this 5 year old girl to the mother. By now the child has become accustomed to her mother and has been meeting her every week for more than two months.

18. Therefore, the petition is allowed and disposed of in the following terms:-

- (i) That the husband shall produce the child namely, Miss Anushka Saha before the Registrar General of this Court on 16th October, 2015 at 10.30 a.m.
- (ii) the Registrar General with the help of Ms. Sima Datta, the Private Secretary and Ms. Bappi Dey,

Superintendent to this Court shall handover the child to the mother in the Court premises and the mother shall remain in the Court premises till about 1 O'clock and by that time, the Registrar General and the Court official shall ensure that the child is comfortable with the mother.

(iii) The father shall bring the clothes and other essential items of the child to be handed over to the mother. On and with effect from 1st October, 2015, the father will pay maintenance of **Rs.10,000/-** (Rupees Ten thousand) per month for use of the child to the mother by remitting into her Bank Account directly. The counsel for the mother is directed to submit the Bank Account number of the mother to the respondent-father within one week from today. The remittance for every month be made on or before 5th of every month.

(iv) The child shall stay with the mother for one complete month without any visitation rights of the father and thereafter, the matter will be taken up by the Magistrate, who keeping in view the order passed hereinabove, will grant visitation rights to the father to meet the child at least once a week.

19. The parties are directed to appear before the Magistrate on 17th November, 2015, when the Magistrate will deal with the matter. In case, the husband has not complied with the direction of this Court and has not paid the maintenance by that date, the defence of the husband in the proceedings before the Magistrate shall be struck off and he shall not be permitted to contest the proceedings till he complies with the orders of this Court.

CHIEF JUSTICE

sima