

OD - 1

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WPO/225/2021
NILANJANA GHOSAL
VERSUS
STATE OF WEST BENGAL & ORS.

BEFORE :-
THE HON'BLE JUSTICE
SHIVAKANT PRASAD
DATED: JULY 02, 2021
[Via Video Conference]

Appearance :
Mr. Saurabh Guhathakurta, Advocate
Ms. Rituparna Ghosh, Advocate
Mr. Sourav Sardar, Advocate
...for petitioner
Mr. Uday Sankar Chattopadhyay, Advocate
Mr. Suman Sankar Chatterjee, Advocate
Mr. Pronoy Basak, Advocate
...for adding party (father of the child)
Mr. Arindam Sen, Advocate
Mr. Debmalya Das, Advocate
...for State Legal Services Authority.
Mr. Amitesh Banerjee, Sr. Advocate
Ms. Ipsita Banerjee, Advocate
Mr. P. Sinha, Advocate
... for State of West Bengal.
Ms. Dubdutta Choudhury, Member of CWC.

The Court :- The petitioner is the single mother of her ward Sagnic Bhattacharjee, residing at 46, Bagbazar Street, Kolkata 700 003 and she has showered all love and affection with utmost care in upbringing her minor son and he is studying in Aditya Academy Secondary, Kadambagachi, Barasat, North 24 Parganas, West Bengal,

Kolkata – 700 125 in class VIII standard. The petitioner has alleged illegal and unauthorised detention of her minor son by the respondent No. 2, Child Welfare Committee, Kolkata from the legal and lawful custody of the natural guardian. It is submitted that the petitioner after dissolution of her marriage by mutual consent with her ex-husband, retained custody of her minor son Sagnic Bhattacharjee and the son has been well maintained by her.

It is alleged that on 4th June, 2021 in or about 8.45 am the officers of respondent No. 2 visited the house of the petitioner with the assistance of the respondent No. 6, the officer-in-charge of Shyampukur Police Station and took the custody of her son and they claimed to be the officer of Child Welfare Committee, Kolkata. The petitioner resisted the action taken by the said respondent officials but they managed to take the custody of the minor son of the petitioner from her and on being asked the police officers and the respondent No. 3 said they were taking the child into custody on the strength of an order passed by respondent No. 2. But they refused to show any order pointing out that the custody of the child will be returned in her favour from the office of CWC. Accordingly, the petitioner went to the office of respondent No. 2 but found none in the office due to lockdown. Then she reported to the police station, Park Street, but could not provide any information regarding the minor son of the petitioner. It is alleged that the officers of the respondent No. 2 have subjected her minor son to inhuman

treatment and torture but the petitioner is not in the knowledge of whereabouts of her minor son Sagnic and the nature of the legal proceeding passed by the respondent No. 2. Then petitioner wrote a complaint to respondent No. 2 on 9th June, 2021 narrating the entire state of affairs and inhuman torture meted out towards the minor son by the officers of respondent No. 2 while snatching the custody of the minor son Sagnic from the petitioner and the petitioner was not even allowed to meet her minor son Sagnic. The petitioner being helpless mother has approached this Court alleging unauthorised and illegal custody of her minor son. Hence, the instant application is filed for issuance of writ in the nature of mandamus commanding the respondent authorities, their men and agents and official assigns, each of them, particularly the respondent No. 2 to restore and return the custody of the minor son Sagnic to the petitioner at her residence. Further the petitioner sought for direction upon respondent Nos. 4 to 6 to take appropriate action against the errant officers of respondent No. 2 on the basis of written complaint of the petitioner dated 11th June 2021 and also to consider the representation of the petitioner dated 9th June, 2021. This Court vide its order dated 26th June, 2021 issued notices upon respondent calling upon them to explain the situation under which they had taken the step for custody of the child in a welfare home by the respondent No. 2, when the mother being the natural guardian was capable of maintaining the child. The State Legal Services Authority was also directed to report into

the matter and in compliance thereof report was submitted on 30th June, 2021 and it would reflect from the order passed on 30th June, 2021 that this Court found appearance on behalf of the ex-husband of the petitioner who was allowed to be impleaded as respondent in this writ application. The report of the Member Secretary, State Legal Services Authority, West Bengal dated 29th June, 2021 clearly reflects that it was on the basis of a hand-written complaint of the minor son of the petitioner reported through the ex-husband of the petitioner, the child was taken into safe custody. The allegations so made in the written complaint regarding neglect and ill-treatment against the mother, on being denied by the petitioner even disputing the signature appearing in the written complaint, this Court wanted to ascertain and verify from the said minor son of the petitioner and directed State respondent for safe production of the child.

This day the son of the petitioner Sagnic Bhattacharjee, has been personally interviewed and was even allowed to talk to the petitioner, but it transpires prima facie that the son is right now not willing to go with his mother. Mr. Saurabh Guhathakurta, Advocate refers to a decision dated 2nd November, 2020 passed in WP 21904(W) of 2010 (Dr. Sharmistha Kar Purokayastha V. State of West Bengal & Ors.) to contend that the action taken on behalf of the CWC was not in terms of the law and such action taken has been deprecated by catena of other decisions. He invites my attention to the provision of Section 12 of Guardians and

Wards Act, 1890, which provides power of the Court to make interlocutory order for production of minor and interim protection of person and property which reads thus :-

“12. Power to make interlocutory order for production of minor and interim protection of person and property. – (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

*(3) Nothing in this section shall authorise –
the court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or
any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.”*

In substance the provision provides for temporary custody and protection of the person or property of the minor in the given facts of the case by the Civil Court.

I have discussed in my earlier order dated 30th June, 2021 about guidelines embodied in Clause 9 of NALSA (Child Friendly Legal Services to Children and Their Protection) Scheme, 2015 and under this scheme as per the report of Member Secretary of NALSA the custody of the child was taken care of by CWC. Therefore, it cannot be said that the interim custody of the child being the son of the petitioner, Sagnic, was taken by respondent No. 2 or its official in an illegal manner, because it

was on the basis of a written complaint by the son himself and I have ascertained the signature and his mind as well to prima facie find that the child is not willing to go with the mother.

Mr. Uday Sankar Chatterjee, learned counsel for the father of the child being the added respondent submits that father of Sagnic, being ex-husband of the petitioner is willing to take custody of the child who is also the natural guardian.

Mr. Guhathakurta, learned Counsel for petitioner submits that the son has been brain washed by his father and yet submits that the allegation levelled against the petitioner is engineered by the added respondent, father of Sagnic. The petitioner has urged for a direction to the CWC respondent no. 2 to hand over interim custody of the son. The petitioner, in all fairness, submits that she has an annual turnover of her business to the tune of Rs.6 crores, whereas the ex-husband claims that his annual income is around Rs.6 lakhs and he is employed as an automobile engineer in a private concern. The petitioner earns about Rs.3 crores per annum and she is capable of financially supporting her son in all respect and to provide best education available. Thus, Mr. Guhathakurta submits that the petitioner is ready and willing to support her son even during his interim custody in the safe home by CWC and ready to bear all costs and expenditure for his welfare and well being.

At this stage Mr. Amitesh Banerjee, learned counsel for the State refers to a case of ***Nilratan Kundu Vs. Avijit Kundu*** reported in **(2008)**

9 SCC 413 to submit that legal position in India concerning child custody is fairly well settled and relied on observation in paragraph 56 of the cited decision, thus:-

“56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.”

The provision of Section 7 of Guardians and Wards Act, 1890 provides for the power of the Court to make order as to guardianship:

Where the Court is satisfied that it is for the welfare of a minor that an order should be made:-

“(a) appointing a guardian of his person or property or both, or (b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until

the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

In paragraph 32, the observation reads thus:-

“32. Section 8 of the Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced;

17. Matters to be considered by the Court in appointing guardian.-(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

** * * * * (5) The Court shall not appoint or declare any person to be a guardian against his will.”*

In paragraph 37 of the cited decision further reads:-

“37. Section 8 enumerates powers of natural guardian. Section 13 is extremely important provision and deals with welfare of a minor. The same may be quoted in extenso;

13. Welfare of minor to be paramount consideration.

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

Thus, it is well-settled law in the matter of custody of the child that the paramount consideration is the welfare of the child and not right of

the parents because, even if father though a natural guardian, may be denied custody, if he is not capable of maintaining his child.

Accordingly, Mr. Amitesh Banerjee suggests that the petitioner may be directed to deposit a sum of Rs.20,000/- per month for the purpose of fooding, good lodging and education while son is in safe home and the ex-husband being the father of the ward may also be directed to provide similar amount i.e. Rs.20,000/- and the amount so deposited be exclusively deposited in the separate account in the name of the child for his welfare, education and well being in the Home centre and CWC be directed to maintain separate accounts and provide separate account to both the parties and this exercise has to be done only till the decision of the Competent Court for the custody of the child under Guardians and Wards Act.

Accordingly, both parties i.e. the petitioner and her ex-husband father of the chid are directed to deposit in separate account the sum of Rs.20,000/- each during interim custody of Sagnic Bhattacharya in safe Home with direction to the respondent no. 2 CWC to give visiting right to the petitioner mother and added respondent ex husband of the petitioner on alternative days.

This order is passed in the interest of the welfare of the child but any Competent Court while dealing with the custody of the child would not have influenced by any of the observation made in this order.

With the above direction, the writ petition being WPO/225/2021 is disposed of.

All parties shall act in terms of copy of this order downloaded from the official website of this Court.

(SHIVAKANT PRASAD, J.)

GH/spal.