

26.08.2022
SL-01
Ct.32
(S.R.)

WPA 247 of 2020
Ambar Kumar Chauhan
v.
State of West Bengal & Ors.
with
CAN 1 of 2020

Mr. Saptansu Basu, Sr. Adv.
Mr. Ankit Agarwala
Ms. Sudeshna Basu Thakur ... for the petitioner.

Mr. Sabir Ahmed ... for the State.

Mr. Pawan Kr. Gupta
Ms. Sofia Nesat
Mr. Santanu Sett
... for the respondent nos.11, 12, 14 and 15.

The present writ petition has been preferred primarily seeking a writ of *habeas corpus* to produce the petitioner's son, namely, Riyansh Singh Chauhan (in short, Riyansh), who is alleged to be in the illegal custody of the petitioner's in-laws.

The petitioner's case is that he married one Riya Singh (in short, Riya), daughter of the respondent no.11 on 25th January, 2017. His in-laws are residents of Katihar in Bihar. The marriage was solemnized at Howrah. After marriage, the petitioner along with his parents and Riya started residing at Howrah. At the time of marriage, Riya was pursuing a bachelor degree course in a college at Katihar. In the month of May, 2018, the petitioner took her wife to Katihar so that she may appear in the ensuing examination. At that time Riya was pregnant and she gave birth to a male child on 25th December, 2018 at Katihar. However, certain post-operative complications arose and she had to be admitted in a nursing home, namely, Sipra Nursing Home at Katihar. As her condition deteriorated, she was shifted to Purnia Max Hospital and thereafter to Paras Hospital at Patna. The doctors

attending Riya advised that she should be admitted in a hospital having better infrastructure at New Delhi. Accordingly, she was shifted to Sri Gangaram hospital at New Delhi on 25th January, 2019. Unfortunately, Riya breathed her last on 18th September, 2019. After completion of the last rites, the petitioner requested her in-laws to hand over the custody of his son but they refused. Complaining about such illegal detention, the petitioner submitted a representation to the District Magistrate, Katihar on 23rd October, 2019 and a copy of the same was also served upon the Officer-in-Charge, AJC Botanic Garden Police Station, Shibpur but in vain and as such he was constrained to submit a representation to the Hon'ble President of India on 14th November, 2019. By a memo dated 22nd November, 2019, the Under Secretary to the President's Secretariat forwarded the petitioner's complaint to the Chief Secretary, Government of Bihar for necessary action. In response thereto, the Circle Inspector (B), Nagar Thana, Katihar submitted a report on 20th February, 2020. However, the private respondents did not hand over the custody of the child to the petitioner and as such he was constrained to prefer the present application on 3rd January, 2020.

The respondent no.11 is the father-in-law, the respondent no.12 is the mother-in-law, the respondent nos.14 and 15 are the brothers-in-law and the respondent no.15 is the uncle-in-law of the petitioner. The respondent nos.11, 12, 14 and 15 filed an affidavit in opposition denying the statements made in the writ application and stating *inter alia* that the venue of marriage had to be changed from Katihar to Howrah due to the insistence of the petitioner and they had to pay an amount of Rs.4,00,000/-. They also had to gift a car to the petitioner. After marriage Riya was mentally tortured and traumatized. She was not permitted to visit her parents.

After her pregnancy, she was even asked by the petitioner to abort the child but she denied. The respondents had to bear all medical expenses of Riya. Upon her demise, the petitioner was never prevented from visiting his son but he used to continuously threaten the respondents and as such the respondent no.14 was constrained to lodge a complaint under section 39 of the Code of Criminal Procedure. The respondent no.12 also filed an application under the Guardian and Wards Act before the Family Court, Katihar. The petitioner does not care for his child and he even ignored to bear the medical expenses of his wife. Presently he is determined to enter into a matrimonial relationship afresh.

Considering the fact that the dispute was relating to custody of a child of only two years, a co-ordinate Bench of this Court by an order dated 8th January, 2021 directed the parties to take a proactive approach in the best interest of the child. Subsequent thereto, by an order dated 20th January, 2021, the learned advocate appearing for the State of Bihar was asked to request the Superintendent of Police, Katihar to make an endeavour to pursue the respondents to arrive at a meaningful amicable solution. Thereafter by an order dated 1st June, 2021, the maternal grandparents were directed to make necessary arrangements and to facilitate the *online* meeting of the child with the petitioner on and from 5th June, 2021. By an order dated 27th September, 2021, the parties were also referred to a mediator for resolution of the dispute but in vain.

Mr. Basu, learned senior advocate appearing for the petitioner submits that the petitioner is the natural guardian of the child and has a preferential right to claim custody of his child, who is presently aged about four years. The child has already lost his mother and the petitioner is the only surviving parent and is entitled to

his custody. The child needs love, care and affection of his father. He is the natural guardian and is pitted against his in-laws, who have no legal right and authority to retain the custody of the child. It is, thus, a fit case for issuance of a writ in the nature of *habeas corpus*.

He argues that with the sole intent to frustrate the relief, as prayed for in the present writ petition, the respondent no.12 filed an Act VIII application on 14th January, 2020 at Katihar after the writ petition was affirmed on 3rd, January, 2020. The said application was filed as a litigation stratagem.

He submits that the respondent no.11 is a police personnel and the report filed by the Circle Inspector, Nagar Thana, Katihar dated 20th February, 2020 would reveal that the private respondents had abused the petitioner and his parents. In another report filed by the Superintendent of Police, Katihar it has been clearly stated that no criminal case has been filed against the petitioner and his parents in Nagar Thana, Katihar. Let the supplementary affidavits filed by the petitioner be kept on record.

Mr. Basu strenuously argues that the petitioner has the financial competence to maintain his child. He is engaged in a private concern and is presently earning about Rs.45,386/- per month. He is residing at Howrah along with his parents. His father is working as the Deputy Secretary, Government of West Bengal, Land and Land Reforms and Refugee, Relief and Rehabilitation Department. To buttress his argument, Mr. Basu has placed has reliance upon the judgments delivered in the cases of *Tejaswini Gaud and Ors. -vs- Shekhar Jagdish Prasad Tewari and Others*, reported in 2019 0 AIR(SC) 2318, *Nawal Kishore Sharma -vs- Union of India and Others*, reported in (2014) 9 SCC 329 and *Rakesh Tulsidas Rathod -vs- Jayraj Vishram Vapikar and others* (Writ

Petition No.579 of 2021).

Mr. Gupta, learned advocate appearing for the respondent nos.11 to 14 denies and dispute the contention of the petitioner and submits that the writ petition is not maintainable since no part of the cause of action had arisen within the territory of the State of West Bengal. Prior to the birth of the child, Riya was residing with her parents at Katihar and she gave birth to a male child at Katihar. In support of his contention, Mr. Gupta has placed reliance upon the judgments delivered in the cases of *Alchemist Limited and Anr. –vs- State Bank of Sikkim and Ors*, reported in 2007(11) SCC 335, *Eastern Coalfields Ltd. & Ors. –vs- Kalyan Banerjee*, reported in 2008(3) SCC 456 and *Oil and natural Gas Commission –vs- Utpal Kumar Basu*, reported in 1994(3) SCC 711.

He argues that for determination of the issue of custody of child, it is not the right of the parties but welfare of the child, which is of determinative significance, applies with equal force to a situation like the case in hand.

Mr. Gupta submits that the petitioner asked Riya to abort the child. He did not care for his wife and such carelessness led to Riya's sudden demise. The petitioner even ignored to bear the medical expenses of his wife and as such he cannot be a good father and moreover he is determined to enter into a fresh matrimonial relationship. The child is residing with his maternal grandparents and he has been admitted in a renowned school at Katihar. Claim for custody has to be judged on the touchstone of the welfare of the child. The child had already gained roots at Katihar and issuance of any direction to hand over his custody to the petitioner would affect him psychologically and his welfare would be at peril if his custody is handed over to the petitioner.

In reply, Mr. Basu submits that the foundation and

affectation of the petitioner's right originated in the State of West Bengal and complaining about such illegal detention of his child the petitioner lodged his first complaint in Howrah. The subsequent events are inextricably bound with the above facts and as such it cannot be denied that a part of the cause of action arose within the territory of West Bengal and the present petition is, thus, maintainable.

The proposition of law that can be culled out from the judgments, as cited by the respondents pertaining to maintainability of the writ application, is that on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial, it has to be explicit that a part of cause of action has arisen within the jurisdiction of the Court. In the present case, the marriage was solemnized at Howrah. The couple was residing at Howrah till the month of May, 2018. As the private respondents denied to hand over the custody of the child after the death of Riya, the petitioner lodged a complaint before the District Magistrate, Howrah with a copy to the Officer-in-Charge, AJC Bose Road Botanical Garden Police Station, Shibpur at Howrah. From such averments made in the writ application, we are of the opinion that the petitioner has been able to establish that a part of the cause of action had arisen within the jurisdiction of this Court.

Habeas corpus proceedings is not to justify or examine the legality of the custody. It is a medium through which the custody of the child is addressed to the discretion of the Court. It is true that in child custody matters a detailed enquiry is required, however, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction. In the present case the entitlement of the petitioner to the custody of the child is not disputed. The child's mother had already expired and

in such exceptional circumstances we are inclined to invoke our jurisdiction. However, we may not be understood to have expressed any opinion on the merits of the guardianship application and the competent Court shall decide the same on its own merits without being influenced by any observations made in this judgment.

In the present case, the petitioner is the natural guardian of the child. He is engaged in a private concern and is presently earning about Rs.45,386/- per month, as disclosed through the documents annexed to a supplementary affidavit affirmed on 25th January, 2022. He is residing at Howrah along with his parents. His father is working as the Deputy Secretary, Government of West Bengal, Land and Land Reform and Refugee, Relief and Rehabilitation Department. The private respondent nos.11 and 12 are the maternal grandparents and are aged persons. Their sons being the respondent nos.13 and 14 may be having their own children and it is difficult to vouch that with the efflux of time the present feelings of the private respondents would remain unaltered. Such fact situation cannot be totally ignored.

We do not find any material to infer that the petitioner or his family members treated Riya cruelly or there was any acrimonious dispute amongst them. On the contrary, the contents of the report filed by the Circle Inspector, Nagar Thana, Katihar dated 20th February, 2020, annexed to the supplementary affidavit filed by the petitioner on 12th April, 2022 reveals that the private respondents had abused the petitioner and his parents. It is not a case that the petitioner abandoned his wife while she was being treated in Katihar or that he had refused to bear the medical expenses of Riya's ailments. In our opinion, the petitioner is fit and competent to the custody of his son.

Riya gave birth to the child at Katihar on 25th December, 2018 and expired on 18th September, 2019

and in such circumstances, the child was residing with his maternal grandparents. Merely because the private respondents had to take care of the child during the said period, they cannot claim to retain his custody forever depriving the petitioner, who happens to be natural guardian of the child. It is not a case that there was a marital discord. It is also not a case that failure to bestow requisite love and affection upon the child was the driving factor for the child to come to reside with the private respondents. The child is presently just about 3 years 9 months old and is not in a position to clearly indicate his preference. The Court cannot lose sight of the fact that the child has lost his mother at a very young age and he requires the parental love, care, affection and protection, which in our opinion can only be extended by his natural guardian moreso when, he has a support system in place in the form of his parents.

Taking away the child from the custody of the private respondents and handing over such custody to the petitioner might cause some problem initially; but, in our opinion, that will be neutralized with the passage of time.

In such circumstances and in the best interest of the child we are of the opinion that he should be united with his father.

Accordingly, the present application is allowed with the following directions :

- a) The private respondents shall hand over the custody of the child to the petitioner at the petitioner's residence, within four weeks from date;
- b) The petitioner shall provide access through video conferencing on Fridays and Sundays to the respondent nos.11 and 12 for conversation and interaction with the child during the period from 5 pm to 6 pm;
- c) The private respondent nos. 11 and 12 would be at liberty to visit the child on the 2nd and 4th Saturdays of

every month for the period from 12 noon till 8 pm at the petitioner's residence and during such visit, the appellant and his parents shall ensure the comfort of the said respondents;

d) The private respondent nos. 11 and 12 would also be at liberty to visit the child at the petitioner's residence on the day of the festivals of '*Holi*', '*Rakhi*', '*Nabaratri*', '*Diwali*' and '*Bhaiaduj*' from 12 noon till 8 pm and during such visit, the appellant and his parents shall ensure the comfort of the said respondents.

In the event the custody of the child is not handed over to the petitioner by the private respondents, the State respondents shall provide the necessary aid to petitioner for taking custody.

Similarly, in the event the visitation rights, as granted to the respondent nos. 11 and 12 by this order, are denied to the said respondents, the State respondents shall provide the necessary aid to said respondents.

Keeping in view the interest of the child, the both parties shall co-operate with each other in compliance with the directions of the Court.

The writ petition being WPA 247 of 2020 and the connected application are, accordingly, disposed of.

There shall be no order as to costs.

Urgent Photostat certified copy of the order if applied for, be made over to the parties as expeditiously as possible.

(Raja Basu Chowdhury, J.) (Tapabrata Chakraborty, J.)