

15.09.2022

Court No.32
rpan/10

WPA (H) 33 of 2022
Sahanaj Khatun @ Sahanaj Khatun Bibi
- Versus -
State of West Bengal & Others

Mr. Sarwar Jahan,
Mr. Maidul Islam Kayal
... for the Petitioner.
Mr. D. Chatterjee,
Mr. Simanta Kabir,
Mr. N. Nath
... for the State.
Mr. Joy Chakraborty,
Mr. Sandip Dinda
... for the Respondent Nos.6 & 7.

The present writ petition has been preferred primarily seeking a writ of *habeas corpus* to produce the petitioner's two minor sons, who are alleged to be in illegal custody of the petitioner's in-laws, the respondent nos.6 and 7.

Shorn of unnecessary details, the facts are that the petitioner married one Md. Haidar Ali on 22nd June, 2008. She gave birth to two sons, who are presently aged about 5 years and 11 years. Her husband, who was a Civil Police Volunteer, unfortunately expired in a road accident on 11th February, 2020. Neither the petitioner nor her in-laws has filed any application under Act VIII.

Mr. Jahan, learned advocate appearing for the petitioner submits that the petitioner is the natural guardian of the children and has a preferential right to

claim custody of her children, who are minors. The children had already lost their father and the petitioner is the sole surviving parent and is entitled to their custody. After the sudden demise of the petitioner's husband, she was tortured and compelled to leave her matrimonial house and her sons were forcibly detained by her in-laws.

He argues that the minor children need love, care and affection of their mother. There are clinching materials on record to show that the welfare of the minor children is at peril. The trauma that the children are facing needs to be appreciated. Their safety and welfare can be assured only if their custody is given to the petitioner. In support of such contention, he has placed reliance upon the judgments delivered in the cases of *Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others*, reported in *AIR 2019 (SC) 2318*, *Yashita Sahu Vs. State of Rajasthan & Others*, reported in *AIR 2020 (SC) 577*, *Vasudha Sethi & Others Vs. Kiran V. Bhaskar & Another*, reported in *AIR 2022 (SC) 476* and *Swaminathan Kunchu Acharya Vs. state of Gujarat & Others*, reported in *(2022) 5 Supreme 529*.

Mr. Kabir, learned advocate appearing for the State respondents denies the allegations levelled against the State authorities and submits that the petitioner is well aware of the fact that her children are presently residing with her in-laws and it is not a case of illegal

detention and in such circumstances, no interference is called for in the present *habeas corpus* petition.

Mr. Chakraborty, learned advocate appearing for the private respondent nos.6 and 7 submits that the petitioner herself deserted her children after the unfortunate death of Md. Haidar Ali. A purported complaint was lodged by the petitioner as regards the minor sons' custody about two years after she left her matrimonial house. From such conduct it is explicit that she does not deserve the custody of the children.

He contends that the petitioner has no earnings and is totally dependent upon her aged mother. The welfare of the minor children would be at stake if their custody is handed over to the petitioner. There is no exceptional circumstance warranting interference of this Court in exercise of its extraordinary jurisdiction. In support of his argument, Mr. Chakraborty has placed reliance upon the judgments delivered in the cases of *Sumedha Nagpal Vs. State of Delhi & Others*, reported in 2000(6) *Supreme* 376 and *Dr. Mrs. Veena Kapoor Vs. Varrinder Kumar Kapoor*, reported in AIR 1982 SC 792. Reliance has also been placed upon two unreported decisions passed in W.P. No.23496 (W) of 2017 [*Sk. Monir Hossain Vs. The State of W. B. & Ors.*] and WPA 10279 of 2020 [*Sri Kalyan Koley Vs. The State of West Bengal & Ors.*].

Indisputably, the complaint pertaining to custody was submitted by the petitioner about two years after she left her matrimonial house. There is no contemporaneous representation on record in support of her contention that she was forcibly driven out from her matrimonial house and that the custody of her minor children was forcibly retained by her in-laws. It appears that the petitioner has no independent income and is dependent upon her aged mother and her brothers, who are having their respective families. In order to secure the future of the petitioner's minor children, the respondent no.6 purchased one property in the name of his grandsons and also gifted a property to them. There is no material on record to infer that the petitioner's children had been illegally detained by her in-laws.

The proposition of law that can be culled out from the judgments, upon which reliance have been placed upon the parties, is that for determination of the issue of custody of children, it is not the right of the parties but the welfare of the children which is of determinative significance. In child custody matters the ordinary remedy lies under the Guardians and Wards Act. There are significant differences between the inquiry under the Act VIII and the exercise of powers of a writ court, which is summary in nature.

From the pleadings and the documents, placed before us, we do not find any clinching material to infer

that the welfare of the minor children is at peril. The allegations and the counter-allegations levelled by the parties need to be examined with reference to evidence.

In view thereof, we are unable to accept the contention of Mr. Jahan and to issue necessary directions upon the private respondent nos.6 and 7 to hand over the custody of the children to the petitioner.

However, the petitioner's in-laws cannot deprive the petitioner of her right to visit her minor children and as such, we direct that the petitioner with any one of her relatives would be at liberty to visit her children on every Sunday on and from 12:00 noon to 06:00 p.m. at the residence of the respondent no.6 and during such visit the respondent no.6 & 7 shall ensure the comfort of the petitioner and her companion. In the event, such visitation right is denied to the petitioner, the State respondents would provide the necessary aid to the petitioner.

We make it clear that the above directions would be subject to any order that may be passed in custody proceedings initiated before the appropriate forum by the parties. It is also made clear that the competent court would be at liberty to pass appropriate orders in such guardianship proceedings, without being influenced by the observations made by this Court in this order.

With the above observations and directions, the present *habeas corpus* petition, being WPA (H) 33 of 2022 is disposed of.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)