

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

**WPA (H) 67 of 2023
With
IA NO: CAN 1 of 2024
With
IA NO: CAN 2 of 2024**

**PUNDRICK BAGHEL
VS
THE STATE OF WEST BENGAL AND ORS.**

For the Petitioner : Ms. Malavika Rajkotia,
Mr. Sabyasachi Banerjee,
Ms. Diksha Ghosh,
Ms Susha Unni, Advocates

For the Respondent : Mr. Bhaskar Prosad Banerjee,
No.5 Mr. Aniket Mitra,
Mr. Parashar Baidya, Advocates

For the State : Mr. Debabrata Chatterjee,
Mr. Amrita Panja Moulick, Advocates

Heard on: August 29, 2024 & September 6, 2024

Judgement on: September 06, 2024

DEBANGSU BASAK, J.

1. Writ petition along with two connected applications are taken up for final disposal.

2. Writ petitioner as the father of the minor seeks a direction upon the police to produce his minor daughter in a Court of law. He also seeks a direction on his wife, the respondent No. 5, to hand over temporary custody of their daughter to the writ petitioner.

3. Two interim applications were filed by the writ petitioner. One is CAN 1 of 2024 in which, writ petitioner seeks modification of the directions given in paragraphs 5 to 11 of the order dated February 22, 2024 and a direction that the minor may be examined/evaluated by a qualified clinical Psychologist at Bengaluru or New Delhi. The other application is also interim application and at the behest of the writ petitioner which is CAN 2 of 2024 where, the writ petitioner seeks a direction to advance the date of the hearing.

4. Writ petition along with two interim applications were heard extensively on August 29, 2024. In view of the agreement of the parties on such date, we modified paragraph 12 of the order dated February 22, 2024. We are informed that, one meeting took place pursuant to our order dated August 29, 2024 between the writ petitioner and the child in the interregnum.

5. Learned advocate appearing for the writ petitioner submits that, child in question is a nine-year girl child with Autism Spectrum Level-III since 2018. Since 2017, parents of the child along with the child were living in

the United States of America till the respondent no. 5 removed the girl child to India in late 2023.

6. Learned advocate appearing for the petitioner points out that the minor underwent primary schooling at the United States of America and is only familiar with the social and cultural milieu of the United States. Minor was under extensive treatment, including regular requisite therapies since 2018. Minor at her age of three years was diagnosed with being on the spectrum. All expenses pertaining to the child since birth, such as educational, medical or otherwise were provided by the petitioner singularly. She points out that, medical insurance in United States of America covers all expenses without any upper limit. Moreover, in India insurance coverage in respect of autistic persons are restrictive.

7. Learned advocate appearing for the writ petitioner submits that, there is no material on record to establish that the medical treatment mandatorily required by the minor is being provided to her in India. She points out that there is a report dated February 7, 2024 which, according to her, falsely projected as if a purported homely environment is available to the minor at present. She refers to the order dated January 19, 2024 passed by the High Court which directs psychologist to assess if any treatment is required by the minor. She refers to the report dated January 8, 2024 and the final report dated February 7, 2024. She contends that,

the final report is conspicuous by the absence of any effort by the psychologist to speak on the issue as to whether the nature of treatment available in the United States of America could be more beneficial to the minor or not.

8. Learned advocate appearing for the petitioner submits that the psychologist did not meet the writ petitioner. Psychologist did not interact with the writ petitioner. Therefore, the report prepared by the psychologist is suspect. She refers to the prescription of R.G. Kar Medical Hospital, which according to her are mere visit notes which indicate no physical behavioral developmental therapies being provided to the child. Therefore, according to her, minor is not being provided with the best medical treatment which the petitioner can provide her with.

9. On the aspect of the schooling and educational issues, learned advocate appearing for the writ petitioner submits that, minor would be better placed to receive her education in United States of America. Minor was exposed to English as her primary language at the United States of America during her formative years. Moreover, interim measure by the High Court to admit the minor at the Calcutta International School was not implemented.

10. Learned advocate appearing for the writ petitioner submits that, interest and welfare of the child in a custody matter is the paramount, if

not sole consideration. In support of her contention, she relies upon **(1998) 1 SCC 112 [Dhanwanti Joshi vs. Madhav Unde]**, **(2017) 8 SCC 454 [Nithya Anand Raghavan vs. State (NCT of Delhi) Y Anr.]**, **(2018) 2 SCC 309 [Prateek Gupta vs. Shilpi Gupta & Ors.]**, **(2020) 3 SCC 67 [Yashita Sahu vs. State of Rajasthan & Ors.]** and **2022 SCC OnLine 43 [Vasudha Sethi and Ors. vs. Kiran V. Bhaskar & Anr.]**

11. Learned advocate appearing for the respondent No. 5 submits that, the writ petitioner was in a relationship outside his marriage at his work place at United States of America. In order to suppress such activity, writ petitioner was constantly monitoring the mobile phone of respondent No. 5 through mobile software. He was also restricting access of the respondent No. 5 to the outside from their house. The writ petitioner is aggressive, violent and dominating. Writ petitioner made the environment at the home in United States of America toxic for all the three persons concerned.

12. Learned advocate appearing for the respondent No.5 contends that, after the minor was diagnosed in 2018 as an autistic, writ petitioner did not take appropriate care of both the respondent No. 5 and her child.

13. Learned advocate appearing for the respondent No. 5 submits that, the respondent No. 5 informed the Consulate General of India by an electronic mail on May 24, 2023 and May 26, 2023 of the compelling

circumstances under which she was forced to return to India with her child. She lodged a complaint with the Baguiati police station on October 1, 2023.

14. Learned advocate appearing for the respondent No. 5 submits that, the writ petitioner filed a complaint with the Baguiati police station when, Officers attached to Baguiati police station visited the paternal home of the respondent No. 5 on September 17, 2023. He submits that, although, the writ petitioner was aware that the respondent No. 5 travelled to India with the minor, none the less he intentionally filed false missing report with the police on September 20, 2023.

15. Referring to the health condition of the minor, learned advocate appearing for the respondent No. 5 submits that the child recovered from autism and in support of his contention, he relies upon medical documents. He submits that the minor was treated at the R.G. Kar Medical College and Hospital.

16. So far as studies of the minor is concerned, learned advocate appearing for the respondent No. 5 submits that the minor is studying in Class-III presently at Calcutta Public School. He also places on record, the progress report of the minor.

17. Learned advocate appearing for the respondent No. 5 submits that, the writ petitioner filed a petition for divorce in the United States of

America which is now pending. Therefore, any direction by the Court for return of the minor or the respondent No. 5 to United States of America will be inimical to both the respondent No. 5 as well as the minor. In support of the contention that the writ petition is not maintainable and no relief should be granted to the writ petitioner, learned advocate appearing for the respondent No.5 relies upon **2023 SCC OnLine 1996 [Snehashis Sarkar vs. State of West Bengal & Ors.]**, **2021 SCC OnLine SC 3434 [Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba]**, **(2019) 7 SCC 42 [Tejaswini Gaud and Ors. vs. Shekhar Jagdish Prasad Tewari & Ors.]** and unreported decision of the co-ordinate Bench passed in **WPA 4817 of 2020 (Snehashis Sarkar vs. The State of West Bengal & Ors.)** dated **November 24, 2020**.

18. Writ petitioner and the respondent No. 5 married on January 31, 2013. A minor daughter was born to them on December 23, 2014. Writ petitioner and the respondent No. 5 along with their minor daughter were residing in United States of America when the minor was diagnosed with autism on August 17, 2018.

19. None of the private parties before us namely, the writ petitioner, respondent No. 5 and the minor are citizens of United States of America. All of them are citizens of India. United States of America is the work place of the writ petitioner.

20. In response to a query of Court, learned advocate appearing for the writ petitioner submits that, the writ petitioner is yet to receive a green card to reside in the United States of America permanently.

21. As matters stand today citizenship of the foreign country for the writ petitioner is a far cry and unlikely to occur in the foreseeable future. Consequently, both the writ petitioner and if the family of writ petitioner joins him, would be living in a foreign country at the mercy of such foreign country. Possibility of an unceremonious exit from the foreign country is large and distinct.

22. In response to the query of the Court, learned advocate for the respondent No. 5 submits that, the respondent No. 5 is an ordinary resident of the place as described in the cause title of the writ petition.

23. Apparently, there are matrimonial disputes between the writ petitioner and the respondent No. 5. Writ petitioner filed a proceeding for divorce in the United States of America. Learned advocate appearing for the writ petitioner submits, on instructions that, the writ petitioner is willing to withdraw such divorce proceeding in the event, the respondent No. 5 is ready and willing to stay with the writ petitioner at the United States of America. She also points out that, the application for divorce before the United States of America Court is on the ground of irretrievable

break down of marriage and such ground is not recognized as a valid ground in India.

24. It is in 2023 that the respondent No. 5 returned to India along with the minor. She informed the Consulate General of India by electronic mail as to her return. In such electronic mail, she detailed the reasons for her return to India.

25. Criminal complaints were registered both by the writ petitioner as against the respondent No. 5 as also by the respondent No. 5 against the writ petitioner and his family with the police.

26. Minor is in the custody of the respondent No. 5, her mother, as natural guardian. There is no order of any Court in India or of the USA governing the custody of the minor when, the respondent No. 5 brought the child from the USA to India. Even today, there is no such order.

27. In course of hearing of the writ petition, co-ordinate Bench from time to time issued certain directions with regard to medical condition of the minor, her education and the visitation right of the writ petitioner. Lastly, by consent of the parties, we passed an order dated August 29, 2024 wholly without prejudice to the rights and contentions of the parties and without prejudice to the point of maintainability of the writ petition. Our order was limited to the visitation rights.

28. In course of hearing of the writ petition, we inquired of the writ petitioner as to whether he was willing to approach the appropriate Court under the provisions of Guardian and Wards Act, 1890 with regard to the custody of the minor or not. His answer was in the negative.

29. Since issues regarding maintainability of the writ petition and jurisdiction of Courts are raised, they require consideration. Private parties cited a number of authorities on such issues.

30. Dhanwanti Joshi (supra) was rendered in the context of proceedings under the Guardian and Wards Act, 1890 which is not the situation before us. We are considering a writ petition of habeas corpus relating to the custody of a minor.

31. Nithya Anand Raghavan (Supra) was rendered in the context of a writ petition for habeas corpus. In the facts of that case, the dispute with regard to the custody of the child was in the context of orders passed by the United Kingdom Court with regard to the custody of the minor and the mother removing the minor in violation of such orders of the foreign Court. In such context, Supreme Court held that, the High Court while dealing with a petition of habeas corpus concerning of a minor child may direct return or decline to change the custody of the child keeping in view all attending facts and circumstances. The Court must consider the welfare of the child to be paramount. In fact, in a given case, the order of the foreign

Court must yield to the welfare of the child. Remedy of a writ Court of habeas corpus cannot be used for mere enforcement of directions given by a foreign Court against a person within its jurisdiction and convert the jurisdiction into that of an executing Court. In the facts and circumstances of the present case, there is no order of any foreign Court or Indian Court on the custody of the minor.

32. Prateek Gupta (supra) was also rendered in the context of a writ of habeas corpus relating to custody of a child where during the subsistence of an interim order of the United States Court granting custody of the child to the mother, such child was brought to India to live with the grand parent. In the facts and circumstances of that case, the mother obtained an order for custody from United States Court and brought the child to India. In such circumstances, Supreme Court noted that, applicability of doctrine/ principles of “comity of Courts” would depend upon various attendant facts and circumstances keeping in mind the primacy of welfare of the child. It also noted that, welfare of the child must prevail as foremost overriding consideration while pre-existing foreign Court order must be taken as one of the factors for deciding the question of custody.

33. In Yashita Sahu (supra), while the couple was living in the United States of America after marriage, consequent upon matrimonial disputes,

wife removed the minor and shifted to India in violation of the order of the US Court. In such circumstances, Supreme Court took into consideration the age of the child, her nationality, proceedings in the US Court and the visa issued to the father and held that the father of the child was entitled to custody in the best interest of the child. Supreme Court held that the Court cannot direct the mother to return to the United States of America against her will.

34. Vasudha Sethi & Ors. (supra) relates to a child who was a citizen of the United States of America by birth and was holding a United States of America passport. Mother of the child apparently brought the minor in her custody to India. There were orders passed by the Court in the United States with regard to the custody of the minor. In such circumstances, Supreme Court issued directions that the minor be returned to the United States of America.

35. In Tejaswini Gaud and Others (supra), Supreme Court observed that, in child custody matters, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. It also noted that, there are significant differences between the enquiry under the Guardians and Wards Act and the power exercised by the Writ Court which is summary in nature. It observed that, where the High Court is of the view that the detailed enquiry is required, the High

Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the Civil Court. It is only in exceptional cases that the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction of a petition for habeas corpus.

36. Coordinate Bench in the case of **Snehashis Sarkar (supra)** passed in WPA 4817 of 2020 noted that, there was a disturbing trend in which habeas corpus jurisdiction was becoming more of a matrimonial battle field and was being abused in guardianship matters. It noted that, the minor therein was in the custody of the mother that there was no order of any competent court prohibiting such custody.

37. Another Coordinate Bench in **Snehashis Sarkar (supra)** noted that, in the determination of the issue of custody of the child, the welfare of the child is the determinative significant.

38. In **Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba (supra)**, Supreme Court was dealing with a petition under Article 32 of the Constitution of India. It noted **Yashita Sahu (supra)** and **Tejaswini Gaud and Ors. (supra)**, amongst others. Noting that the custody of the children therein was with the mother who was their natural guardian, such custody cannot be said to be illegal and, therefore, found the writ petition for habeas corpus under Article 32 of the Constitution of India to be not maintainable. Supreme Court dismissed such petition.

39. Existence of the following jurisdictional facts are mandatory for the maintainability of a writ petition of habeas corpus for the custody of the minor :-

- (i) minor is in illegal custody or detention,
- (ii) ordinary remedy in law is either unavailable or ineffective.

40. In the facts of the present case, jurisdictional fact that the minor is in illegal or wrongful custody or detention is squarely absent. Admittedly, the minor is with her mother who is her natural guardian. There is no order passed by any Court prohibiting custody of the minor with her mother where she presently is.

41. Apart from existence of the jurisdictional fact of illegal custody of the minor, in habeas corpus writ petition for the custody of a minor, it must be established that the ordinary remedy provided by law is either unavailable or ineffective.

42. In the facts and circumstances of this case, none of the jurisdictional facts exists. Custody of the minor with the respondent no.5 cannot be held illegal as she is with the mother and no order of Court prohibits such custody. Mother of the child is recognized as a natural guardian of a minor. Nothing is placed on record that the ordinary remedy is unavailable or ineffective.

43. Medical treatment of the minor and her evaluation was directed by the Coordinate Bench. Such evaluation occurred. It is the view in such evaluation process that, the minor stands cured of the medical condition that she was suffering. Such view is contested on behalf of the writ petitioner. We need not answer such contest in view of the absence of the requisite jurisdictional facts for us to assume jurisdiction on such issue.

44. Minor is studying in Calcutta Public School. Efforts of the Coordinate Bench to admit the minor at a different school did not work out. The designated school gave reasons why the minor could not be admitted to such school. Present school where the minor is studying cannot be held to be inadequate for the minor. There is no material to come to such finding.

45. Coordinate Bench provided a mechanism for visitation. There are disputes between the two parents of the minor as to the manner in which, such visitation right order was worked out. We provided a mechanism by consent of the parties by our order dated August 29, 2024. We are informed that, the same was worked out. Since the essential jurisdictional facts for assumption of jurisdiction are absent in the facts and circumstances of the present case, we are not minded to interfere any further in a writ petition of habeas corpus. The private parties are at liberty to avail of their remedies from the appropriate Court.

WPA(H) 67 of 2023

46. Apart from the lack of jurisdiction, which we noted above, we find, there are disputed questions of facts involved which should not be decided summarily by way of a writ petition. Disputed questions of fact relate to the care and custody of the minor, her medical condition as also her well being.

47. In such circumstances, WPA (H) 67 of 2023 along with all connected applications are **dismissed** without any order as to costs. All interim orders stand vacated.

(Debangsu Basak, J.)

48. I agree.

(Md. Shabbar Rashidi, J.)

(Dd/AD)