Shanta Roy (Sen) Vs State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: Nov. 24, 2008

Acts Referred: Constitution of India, 1950 â€" Article 226
Guardians and Wards Act, 1890 â€" Section 7
Penal Code, 1860 (IPC) â€" Section 498A

Hon'ble Judges: Prabuddha Sankar Banerjee, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Hiran Lal Majumdar, Subrata Kumar De, Shakeel Mohammed Akhter, for the Appellant; Sandipan Ganguly, Partha Pratim Sarkar Respondent No. 6 Asis Sanyal, Saibal Mondal for the Respondent No. 5 Ld. Addl . Advocate General for the State, for the Respondent

Final Decision: Dismissed

Judgement

The Judgment of the Court was as follows:

1. In response to a prayer- ""a Writ of or in the nature Habeas Corpus do issue commanding the respondent Nos. 1 to 4 and each of them to

produce the body of Mitrabinda Sen, the minor daughter of the petitioner in Court and be made over to the custody of the petitioner and/or set at

liberty;"", made by the petitioner in this application for a writ in the nature of a Habeas Corpus, we had issued Notice.

2. Pursuant thereof all the parties appeared and have made their detailed submissions.

3. Since the issue involved in this case related to the custody of the minor child of the petitioner and the respondent No. 6, before proceeding

further we had decided to interact with the said child in presence of her Parents and Maternal Grand Parents including the respective learned

Counsel, representing the said parties.

4. On 21st instant in the afternoon session of the Court we "in camera" had a prolonged dialogue with the child in presence of her mother

(petitioner) and her father (respondent No. 6) and in presence of the other persons which we have noted hereinabove.

5. In view of the fact that there was some overture made to the effect that there can be a talk of compromise between the petitioner and the

respondent No. 6 and since we also felt that since the hidden agenda related to the rupture in the conjugal life of the couple, we also in the process

sought for the co-operation of the learned Counsel, so that a compromise can be effected between the parties which as a necessary fall out would

result in the re-union of the child with her parents. Accordingly, we had proceeded to a certain extent by our order passed on Friday last. But due

to subsequent development where the child expressed her disinclination to proceed with her mother, we kept the said order in abeyance.

6. In terms of our earlier Order passed on Friday, today was the scheduled date for hearing and at the out set when the learned Counsel for the

petitioner rose for making his submission we again requested the little child to come before us in Court and point out to her Parents and Maternal

Grand Parents and to express her willingness as to with whom she would be inclined to reside. She in a point blank manner stated that she would

not leave Asansol which is her present place of residence pursuant to the interim direction passed by the learned District Judge, Burdwan in Act

VIII Case No. 18 of 2008 and Order No. 2 dated 14.11.2008 under the Guardians and Wards Act, 1890.

7. Again we requested her to make up her mind as to whether she would be still inclined to stay with her mother. She again in presence of all

concerned stated that in the event her mother goes and resides with her in Asansol she is willing.

8. As a side view of the matter while addressing ourselves with regard to the issue of rapprochement between the couple, we have found the

respondent No. 6 was most ready and willing to take back the petitioner to his fold and lead a conjugal life. The respondent No. 5, who is none

else but the father of the present petitioner along with her mother did not wish to part with the child lest she may be taken away for the reasons

which have been detailed in the order passed by the learned District Judge, Burdwan and it would not be in good taste for us to adumbrate the

same. The petitioner was not desirous of proceeding further. We find there is a case in respect of section 498A of the Indian Penal Code against

the respondent No. 6. We have also heard the learned Additional Advocate General on this score. We think we need not say anything further on

this issue.

9. In such trajectory we have proceeded to hear the submissions made at the Bar. Prima facie we have come to the conclusion that there is no

chance of any compromise being effected between the petitioner and the respondent No. 6 in spite of our best efforts. Although we do not rule out

the said possibility in the near future and we would, hoping against hope still hope that some day the couple would be reunited and nothing more

could be more happy for the little child who is shunted between the estranged couple and her Maternal Grand Parents, This is never a tacitum

situation.

10. Shri Sanyal for the respondent No. 5 took a preliminary objection with regard to the maintainability of the writ. Referring to an order No. 2

dated 14.11.2008 passed in Act VIII Case No. 18 of 2008 by the learned District Judge, Burdwan in connection with an application u/s 7 of the

Guardians and Wards Act, 1890. Shri Sanyal submitted that the child in question has been given in favour of the respondent No. 5. Since the

competent Court of jurisdiction has granted the custody of the child it cannot be stated that she is in wrongful confinement, accordingly, the writ is

liable to be dismissed.

11. Amidst this background we have been addressed at the Bar.

12. Shri Hiran Lal Majumdar for the petitioner has submitted that the respondent No. 6 has not been leading a virtuous path which exposed the

matrimonial life of the petitioner to rough weather. She had to file a case u/s 498A of the Indian Penal Code against him for alleged torture and

cruelty. Shri Majumdar also submitted that the father has abandoned the child in favour of the respondent No. 5 which was absolutely an illegal

act. The petitioner being the mother in such situation would be entitled to her custody as she can also be deemed to be a natural guardian. He

referred to the decision of Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another, on this point.

13. He also submitted that the mother was the best person to look after the welfare of the child by way of giving her affection and care which the

father or even her Maternal Grand Father would not be in a position. According to" Shri Majumder the welfare of the child is the paramount

consideration which the Court will have to take in consideration before deciding the question of custody.

14. In support of his contention he referred to the following decisions:

1) Gohar Begam Vs. Suggi alias Nazma Begam and Others,

2) Mausami Moitra Ganguli Vs. Jayant Ganguli,

3) Elizabeth Dinshaw vs. Arvant M. Dinshaw., AIR 1987 SC 3;

4) Rosy Jacob Vs. Jacob A. Chakramakkal, .

15. On the question of Order passed by the learned District Judge, Burdwan Shri Majumdar submitted that since the same was passed without

any Notice upon her, the petitioner has no knowledge and it would have no effect on her and the Order being ex parte was absolutely il1egal and

furthermore that the Order which was passed suffers froth lack of inherent jurisdiction in view of section 7 of the Guardians and Wards Act. 1890.

Shri Majumdar submitted that the Court of the District Judge, Burdwan did not have any jurisdiction to pass any order as the child was residing in

Kolkata.

16. Shri Sanyal for the respondent No. 5 reiterated his preliminary objection and prayed for dismissing the application having no merit.

17. Shri Sanyal was also of the view that the relief claimed by the petitioner in this application cannot be considered also for the reason that the

child, in question was not in illegal detention. Her Father (respondent No. 6) is a busy Medical Practitioner and he is attached to a big Hospital of

the City. The respondent No. 6 due to his Professional commitments and on account of the fact that his parents reside in a desolate place in

Bankura, has voluntarily entrusted his daughter to her Maternal Grand Father (respondent No. 5) where the said child is residing very happily. The

question of any force does not arise.

18. Shri Ganguly for the respondent No. 6 and learned Additional Advocate General for the State-respondents also endorsed the views of Shri

Sanyal.

19, On the basis of the submission made at the Bar and on perusal of the decisions cited, we would now proceed to dispose of this Application in

the light of the prayer made therein.

20. It is by now a trite position of law that while considering the question of the custody of a minor the paramount consideration would be welfare

of the child Nothing else can be of any consideration of decisions cited in Githa Hariharan & Anr vs, Reserve Bank of India & Anr., (supra),

Gohar Begum vs. Suggi alias Nazma Begum & Ors., (supra), Mausami Moitra Ganguli vs. Jayant Ganguli (supra), Elizabeth Dinshaw vs. Arvant

M. Dinshaw (supra) and Rosy Jacob vs. Jacob A. Chakramakkal (supra) have square application in, relation of the submissions made by Shri

Majumdar"".

21. In a given circumstance we would have readily accepted the version of Shri Majumdar and considered the question of returning the child in

favour of the petitioner. After all it is the mother, who is the best person to take care of a child of such tender age (ten years). It is her care and

affection which would be the sole succour for her, nothing can be a substitute. A child can be reared up in the absence of a Father if the mother is

there to give it shelter; but, the converse is not true.

22, But in the peculiar factual matrix of the present case we have found that the child is absolutely traumatized. In course of our interaction with her

we have been able to conclude that she can understand the consequences of her being deprived of the company of the mother. Her answers to our

questions were cogent and consistent. She was of the firm view that she would not go back to her mother accepting her as a sole parent. Her

mother, on the contrary, also did not wish to return to the fold of her husband without her company. Whilst her Maternal Grand Father

(respondent No. 5) expressed his apprehension that she may be taken away in the event the petitioner has grasp over the child even for a single

moment.

23. A delicate issue has been thrown open before us where an extremely humane problem is required to be solved in a very delicate fashion

forgetting for the moment the claptrap of legal niceties and the rig ours of the law of Evidence and other laws governing the field.

24. From our perception of the entire feedback that we have received, we are of the considered view it will not be in the interest of the child to be

with the petitioner even for a single moment for reasons which has been embedded in her tender mind.

25. If we take the extreme step by applying the touchstone of her ""welfare"", we would be doing an unjust and an unkind act. She is all set for her

Maternal Grand Father (respondent No. 5). The question of the welfare of a child and the mother being the repository of love and affection is an

axiomatic truth.

26. Truth, however, is sometimes stranger than fiction. In this application, the truth is that the little child is somehow or the other [READ: the

circumstances set out by the learned District Judge in his Order], Not willing to be restored to her mother. We would be plucking an infant sapling

and transplanting it in a foreign soil if we respond to the prayer made in this writ application in the process the sapling perhaps would die its natural

death and would not live upto a blossoming plant.

27. The objection of Shri Majumdar that the father has abandoned the little child in favour of the respondent No. 5, her Maternal Grand Father

also does not impress us in view of the fact that he has clearly made out a case that he is a busy physician, attached to a big Hospital and has to

keep irregular hours and it would not be possible for him to look after the child in the absence of any female member; more so when his parents

reside in a desolate village in Bankura. Obviously the choice of the custody fell on none else than the respondent No. 5. We see much reason

behind this act and we cannot agree with Shri Majumdar in this aspect.

28. The submission of Shri Majumdar touching on the value of the Order passed by the learned District Judge. Burdwan in our view, would not be

tenable. Firstly, we, in this determination are not sitting in appeal over the said Order which is otherwise appeal able under the statute and

secondly, that the Order is interim in nature and necessary relief, as prayed for, can be sought for modification at the appropriate Forum which

cannot bind us for this moment.

29. It would not be out of place to state that during course of our interaction ""in camera"" with the Couple we have been found that the respondent

No. 6 was willing to reside with the petitioner but in view of the observations made by us in our Order dated 21.11.08 we found that she had her

reservations which resulted in the failure of cementing the disruptive matrimony of the present couple.

30. There were existing cases pending against the respondent No 6 for whatever worth it has, we would be of the view that after all these are all

corollary issues resulting from the jinxed matrimony of the couple which should not take the Court to a large extent.

31. From a wholesome analysis of the entire materials and addressing ourselves with regard to the power in the writ in the nature of Habeas

Corpus, we cannot come to the conclusion that the said little, child is kept in illegal detention by either the respondent No. 6 or respondent No. 5

or even her Matrimonial Grand Mother so that it would inspire us to issue the high prerogative writ in the nature of a Habeas Corpus under Article

226 of the Constitution of India.

32. While arriving at our conclusion, we have also adverted our attention to the decision of the Supreme Court in Nil Ratan Kundu & Anr. vs.

Abhijit Kundu, AIR 2008 SCW 5769. In our opinion the paramount welfare of the child in the present case would be in the event he is permitted

to remain with her Maternal Grand Parents (respondent No. 5 and his wife, who are also present in Court) and we have found from a clinical

assessment that the little child is more inclined towards her Maternal Grand Parents. Our interaction with the little child showed that she was quite

reconciled and happy to be with her Maternal Grand Parents and she desires to reside with them. We have found her to be a bright little young girl,

very receptive and capable of comprehending the entire situation; and we would be of the view that her inclination towards staying with her

Maternal Grand Parents is out of her own volition and on the basis of a matured judgment of a tender age.

33. It would be most appropriate if the little child is left in the care and custody of her Maternal Grand Parents (respondent No. 5, and his wife)

and in the event she is separated by any fiction of law that will to be an end to the child''s further happiness.

34. In view of the discussion hereinabove we see no reason to interfere with this application and accordingly, dismiss the said application by way

of taking this rare step.

35. There would be, however, no order as to costs.