

HIGH COURT OF MADHYA PRADESH, JABALPUR
(DIVISION BENCH)
WRIT APPEAL NO. 486/2021

Sudhir Kumar Ghosh & Ors.

-Versus-

The State of Madhya Pradesh & others

CORAM:-

Hon'ble Shri Justice Mohammad Rafiq, Chief Justice,
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

Whether approved for reporting ? Yes/No

Shri Riyaz Mohammad, learned counsel for the appellant.

Shri B.D. Singh, learned Government Advocate for the respondents
No. 1 to 3/State.

Shri Anil Kumar Pare, learned counsel for respondent No.4.

J U D G M E N T

(JABALPUR: 18.06.2021)

Per: Vijay Kumar Shukla, J.

The present *intra-court* appeal has been filed under Section 2(1) of the *Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam*, 2005, being aggrieved by the order dated 07.04.2021 (Annexure A-1) passed by the learned Single Judge of this Court in W.P. No. 20854/2020 (*Aditi ghosh Vs. State of M.P. & Ors.*), whereby the writ petition has been allowed and the custody of minor child Aditi has been directed to be given to her maternal grandmother Smt. Vimlesh Parmanik. It has been further directed that respondent No.4 Sudhir Kumar Ghosh, being father of the child will have visitation as well as

contact rights. He may visit the child at Jabalpur by giving a notice to the grandmother and keep in contact through calls or video conferencing. In case the respondent No.4, in future decides to take care of his daughter, he may approach this Court again.

2. The writ petition seeking writ of Habeas Corpus was filed by Smt. Vimlesh Parmanik, maternal grandmother on behalf of minor girl Aditi against her illegal detention by her paternal grandfather and uncle. The facts of the case are that Shilpi, daughter of Smt. Vimlesh Parmanik was married to Sudhir Kumar Ghosh (respondent No.4) on 19.02.2013 at Jabalpur. The couple was blessed with a daughter Aditi on 07.03.2014. Unfortunately, Shilpi was diagnosed with cancer and succumbed to her illness on 17.09.2019 at Mumbai. Aditi, who was only 5 and a half years old at that time continued to be in the custody of respondent No.4 at Mumbai. The case of the writ petitioner is that, within two months of the death of Shilpi, Sudhir Kumar Ghosh (respondent No.4), got married again to respondent No.5, who tortured and misbehaved with minor Aditi and got her name struck off from the school. No member of the maternal side was permitted to meet Aditi or even to contact her on phone. On 30.11.2020, when the maternal uncle (mama) of Aditi visited the house of respondents No.4 and 5 at Mumbai, he was informed that Aditi has been sent to Kolkata to her paternal grandfather and uncle. It is stated that when maternal grandmother tried to receive information regarding Aditi, through her relatives at Kolkata, they were also not allowed to meet Aditi.

3. The learned counsel for the writ petitioner submitted that in deciding the question of custody of minor child, the welfare of the minor is paramount consideration. He submitted that respondent No.4, father is the natural guardian of the minor and respondent No.5, since the step mother of the child do not want to look after Aditi, he sent her to Kolkata to live with his widowed father and unmarried brother, who are aged about 85 years and 45 years respectively. He submitted that there is no female member in the house and the girl child, who is of seven years requires care and guidance of female relative, however she has been left in the custody of two adult male members, who have no legal right to keep her.

4. The learned counsel for the appellant on behalf of respondent Nos.4 to 7 (appellants herein) urged that a writ of habeas corpus is not maintainable as it is not a case of illegal detention, the respondent No.4 had left Aditi in the care of her grandfather as his wife, respondent No.5 was in advanced stage of pregnancy (7 months) and could not take proper care of Aditi, and, therefore, decided to sent her to Kolkata to her grandfather and uncle, where she was admitted in Bholananda National Vidyalaya, in class I.

5. Though the counsel for the appellant also argued that he had raised objection regarding territorial jurisdiction but we do not find the same from the order of the learned Single Judge and therefore, the said issue cannot be adjudicated in the writ appeal as the question of territorial

jurisdiction was not raised before the learned Single Judge. However, the writ petitioner has claimed to be a resident of Jabalpur and the marriage of her daughter Shilpi alongwith the respondent No.4 father of the child had taken place at Jabalpur.

6. The learned counsel for the appellant further submitted that, learned Single Judge has erred while exercising the writ jurisdiction in a writ of Habeas Corpus instead of delegating the parties to approach under the Hindu Minority and Guardianship Act or the Guardians and Wards Act. He relied on the judgment passed in the case of ***Tejaswini Gaud and others Vs. Shekhare Jagdish Prasad Tiwari and others (2019)7 SCC 42.***

7. The learned Single Judge has considered the issue of maintainability of the writ petition under Article 226 of the Constitution of India in respect of custody of minor child by referring to the various judgments and held that the Court can invoke its extraordinary jurisdiction for the best interest of the child.

8. In the case of ***Tejaswini Gaud and others Vs. Shekhare Jagdish Prasad Tiwari and others (2019) 7SCC 42***, the Supreme Court has held in para 20 and 26 asunder:-

“20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant

differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

9. In *Nithya Anand Raghavan Vs. State (NCT of Delhi) (2017) 8*

SCC 454, the Supreme Court has held :

“46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration.”

10. In *Kamla Devi Vs. State of H.P. AIR 1987 HP34*, the Court has observed :-

“13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child’s ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court’s view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.”

11. Again in *Govardhanlal Vs. Gajendra Kumar* AIR 2002 Raj 148

the High Court observed:-

“52. 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 the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human 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.”

12. The learned Single Judge has also interacted with the child in person as the respondents were directed to keep the child present through video conferencing. The Court has mentioned in para 12 of the impugned order that the minor girl who was held in the lap of her uncle looked scared and she refused to answer the queries of the Court. The appellants have tried to show through the photographs that Aditi is happy and celebrated her birthday on 28.02.2021 at Kolkata. However, as it was evident from the birth certificate, her date of birth is 7th March and not 28th February and therefore, it was obvious that these photographs were taken only for the purpose of the writ petition.

13. The learned Single Judge has also taken note of WhatsApp message/chat dated 23.06.2020 filed by the respondents as Annexure R-4/9, whereby it is evident that Amit, maternal uncle of Aditi was constantly asking about Aditi and also requesting to talk to her, which was refused by the father of the child (appellant No.1). Clearly, the petitioner and maternal uncle was denied contact with the minor child. Further, communication/chat dated 05.12.2020 of Amit Roy reveals that respondents No.6 and 7 are not willing to take care of Aditi and asked him to take her from Kolkata.

14. The learned Single Judge considering the totality of the

circumstances and looking to the tender age of Aditi, her welfare and best interest, held that her welfare and best interest would be served if the custody is given to her maternal grandmother Smt. Vimlesh Parmanik within a month.

15. The learned Single Judge has also taken into consideration the fact that the minor child is a girl of aged about 7 years, unfortunately she has lost her mother, when she was hardly five years of age. The sole surviving parent got remarried, instead of providing support and emotional stability to the child. The learned Single Judge has further considered that the girls usually being pubertal changes between the age of 8 to 13 years and that time is a difficult time for a girl child as these changes can inspire curiosity and anxiety in some children who does not know what to expect or what is normal. This is the time when girl child needs privacy most and the reassuring approach, understanding and guidance of her mother or a female relative for her healthy development and could not be left under the care of male relatives.

16. The contention of learned counsel for the appellants that it was temporary separation because of the advanced stage of pregnancy of the wife of the appellant No.1 Sudhir Kumar Ghosh cannot be accepted as the name of the minor girl was struck off from the school at Mumbai and she was sent to Kolkata where her name was enrolled in a School to live with grandfather and uncle.

17. The learned counsel for the respondents/writ petitioner relied on

the judgment passed in the case of *L. Chandran Vs. Venkatalakshmi & another (AIR 1981 AP 1)*. In the said case the Court has directed to hand over the custody of the young minor child to the maternal grandmother. It was held that it would not be justified in directing the child to hand over to the father on the basis of uncertain future.

18. We have gone through the order passed by the learned Single Judge and did not find any infirmity with the order as the learned Single Judge has taken care of the welfare of the minor girl child and have directed to hand over the custody to her maternal grandmother Smt. Vimlesh Parmanik. Learned Single has further granted the visitation as well as contact rights to Sudhir Kumar Ghosh, appellant No.1 (respondent No.4 in the writ petition).

19. In view of the aforesaid, we do not perceive any illegality in the order passed by the learned Single Judge and the findings ascribed in the impugned order are impeccable and the same do not warrant any interference in the present intra-court appeal. The writ appeal, being sans merit, is **dismissed**. There shall be no order as to costs.

(MOHAMMAD RAFIQ)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE