

(2013) 06 CAL CK 0039

In the Calcutta High Court

Case No : Writ Petition No. 13048 (W) of 2013

Murari Lal Sharma and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 13-06-2013

Acts Referred:

Citation : AIR 2013 Cal 213

Hon'ble Judges : Subal Baidya, J; Jayanta Kumar Biswas, J

Bench : Division Bench

Advocate : Kamalesh Jha, for the Appellant; Shyamal Sanyal, Anuj Singh, Sounak Sengupta, Rajarshi Dutta and Surya Prakash Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.

1 The petitioners in this WP under Art. 226 of the Constitution of India dated April 26, 2013 are seeking the following principal relief:--

a) Pass appropriate writ, order and/or directions particularly in the nature of Habeas Corpus directing the Respondents 2 & 3 to get the minor Khushi Sharma and Aditya Sharma children of Late Sandeep Sharma released, who have been remained under illegal custody of Respondent Nos. 4 to 11, and hand them over to the petitioners.

The second and third respondents referred to in prayer (a) of the WP are the following:--

2. Station House Officer, Police Station: Chandni Chowk, Delhi-110006.

3. Incharge of Police, Police Station: Regent Park, P.O.: Naktalla, Kolkata 700047.

The petitioners had a son called Sandip. The fourth respondent Sunita was married to Sandip. Out of the wedlock a female child and a male child were born. Sandip died on October 6, 2010. In September, 2011 Sunita left the matrimonial

home with her children. Then she married the fifth respondent Gangeswar on June 21, 2012.

2. The sixth respondent Sharda is Gangeswar's sister. The seventh respondent Ramesh is Sharda's husband. The eighth respondent Kiran is Sunita's sister. The ninth respondent Chandra Sekhar is Kiran's husband. The tenth respondent Ramgopal is Sunita's father. The eleventh respondent Ravi is Sunita's brother.

3. The case of the petitioners is this. Sunita has given custody of her daughter to the sixth respondent. Her son is in the custody of the eighth and ninth respondents. Since Sunita's daughter and son are in the illegal custody of these respondents, a habeas corpus should be issued directing production of the children so that considering the question of their welfare that is of paramount interest, they (the petitioners) can be given custody of the children.

4. Sunita has filed an affidavit. Her case is this. Her daughter is in her custody. She has given her son in adoption to the eighth and ninth respondents. Hence there is no reason to say that the children are in illegal custody of anyone. It is wrong to say that welfare of the children is in jeopardy.

5. Mr. Jha appearing for the petitioners and relying on the decisions in Gohar Begam Vs. Suggi alias Nazma Begam and Others, Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, Rajiv Bhatia Vs. Govt. of Nct of Delhi and Others, and Nil Ratan Kundu and Another Vs. Abhijit Kundu, , has submitted that the petitioners coming up with a specific case that the present custody of the children is prejudicial to the welfare of the children are entitled to seek a habeas corpus and custody of the children.

6. In Gohar Begam Vs. Suggi alias Nazma Begam and Others, , Gohar alleged that Kaniz Begum, Gohar's mother's sister and a respondent in the appeal before the Supreme Court, was illegally detaining Gohar's infant female child. The Supreme Court held that Kaniz having no legal right to the custody of the child and illegally detaining the child, was liable to give its custody to Gohar, entitled in law to the custody of the child.

7. In Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half years old child. The Supreme Court directed the District Judge concerned to take down evidence, if adduced by the parties, and send a report before the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

8. In Rajiv Bhatia Vs. Govt. of Nct of Delhi and Others,) the habeas corpus petition was filed by one Priyanka, the mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husband's elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court "was not entitled to examine the

legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child."

9. Nil Ratan Kundu and Another Vs. Abhijit Kundu, was not a habeas corpus case. There one Abhijit, the father of the child whose mother was no more, applied under the Guardians and Wards Act, 1890 for the custody of the child who was in the custody of Nil Ratan and his wife, the child's maternal grandparents.

10. None of the authorities cited to us support the proposition that even when a child is in the lawful custody of its natural guardian or adoptive parents, its grandparents can file a habeas corpus petition for guardianship and custody of the child.

11. Concerning custody of a child a writ of habeas corpus is to be issued only when it is found that the child seeking whose custody the habeas corpus petition has been filed is in illegal detention or custody of the respondent concerned. A child under a guardianship for nurture is supposed to be unlawfully imprisoned when it is unlawfully detained from the custody of its guardian, and when it is delivered to its guardian, it is supposed to be set at liberty [R. v. Clarke (1857) 7 E1 & B1 186 : 119 ER 1217].

12. Hence bereft of an established case of illegal detention the questions of guardianship and custody of a child are not to be decided in a habeas corpus petition. Guardianship and custody questions arise in a habeas corpus petition only when the child is in illegal detention; and it is set at liberty when it is kept in the custody of a proper guardian.

13. In our opinion, in such a case as in this WP where there is no reason to form an opinion that Sunita's daughter is being illegally detained by Sunita, or that her son given in adoption is being illegally detained by his adoptive parents, power under Art. 226 cannot be exercised for deciding the children's grandparents' claims to guardianship and custody of the children. In our considered opinion, the petitioners claiming guardianship and custody of the children ought to have approached the civil court. For these reasons, we dismiss the WP. Nothing herein shall prevent the petitioners from approaching the civil court. No costs. Certified xerox.