
(2002) 07 PAT CK 0117
In the Patna High Court
Case No : Cr.W.J.C. No. 122 of 2002

Nibha Kumari

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-07-2002

Acts Referred:

Citation : (2002) 07 PAT CK 0117

Final Decision : Allowed

Judgement

S.N. Jha and T.P. Singh, JJ.—This writ petition has been filed by the wife for custody of her ten months old son. The Respondents are the husband and in-laws. The ease of the Petitioner is that she was married to Respondent No. 2 Dhananjay Singh on 11th July 2000 at Dhanbad. On 12th July 2000 she came to her in-laws house at Patna. After sometime the in-laws started ill-treating her. On 23rd November 2000 she went to Dhanbad where her parents live. On 11th April 2001 she gave birth to a male child. None turned up from the in-laws' side, not even Respondent No. 2 to see the child. On 25th June 2001 she came to Patna on her own. After coming to Patna she was continuously tortured by the in-laws including Respondent No. 2 on the ground that she had not brought enough dowry. On the day previous to Dipawali she was even beaten up by Respondent No. 2. When the situation did not improve the Petitioner informed her parents about her plight. On 3rd December 2001 her brother came to Patna and took her to Dhanbad. While she was entering into the car Respondent No. 2 forcibly snatched her then 7 months old son from her lap. The Petitioner thereafter tried her best to get the custody of the child. She was told that she would not be allowed to see the child unless dowry demands are satisfied. In these circumstances, the Petitioner has approached this Court seeking writ in the nature of habeas corpus for the custody of the child.

2. In response to notice, the husband i.e. Respondent No. 2 has filed counter affidavit in which he has made counter allegations against the Petitioner and the members of her family. According to him the root cause of the problem is that

the Petitioner wants to join the legal profession, live in a separate house and start practice together with the Respondent. (It may be mentioned that both the Petitioner and Respondent No. 2 are said to have appeared at the final part of the LL.B. Examination). According to the Respondent the Petitioner is guided by her parents, brothers and sisters and she does not pay heed to the Respondent or other in-laws. However, the Respondent is prepared to forget the past and accept the Petitioner. So far as the custody of the child is concerned, she has to return to the Respondents' house instead of claiming separate custody.

3. When the case came up for hearing on 3rd April 2002 the Court observed that the father's custody may not be said to be illegal and, therefore, the Petitioner may not be entitled to writ in the nature of habeas corpus which can be issued only in cases of illegal custody or confinement. Nevertheless notice was issued to the Respondents with a view that the dispute between the parties may be amicably settled at the intervention of the Court. On 20th May 2002, after hearing the parties, on compassionate ground, custody of the child was directed to be handed over to the Petitioner temporarily till 24th June 2002. This was done in Court on 21.5.2002. The case was ordered to be listed on 25th June 2002 for further direction. Thereafter, the case came up for hearing a number of times. In the facts and circumstances, we decided to talk to the wife-Petitioner and the husband-Respondent No. 2 in Chambers. We did so on 1st July 2002. On 2nd July 2002 we heard their respective father in Chambers. Since we do not propose to finally adjudicate upon the question of custody of the child as between Petitioner and Respondent No. 2, we do not wish to make observations which may cause prejudice to them. Nonetheless, for the purpose of this order we must observe that the attitude of the Respondents' side was far from inspiring. Though in the affidavit Respondent No. 2 stated in clear terms that the Petitioner is welcome in his house, we were distressed to note that in course of proceeding on 2nd July 2002 he stated that he would rather prefer to live without a wife than a "characterless" wife. This made us abandon our efforts for amicable settlement.

4. In a proceeding for custody of child the paramount consideration is the interest and welfare of the child and not the right of one or the other party. In a proceeding under Article 226 of the Constitution, however, it will not be proper to adjudicate upon such a dispute. In Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, the Supreme Court observed that at the habeas corpus stage the interest of the child cannot be determined and, in the circumstances, for proper decision on the dispute directed the concerned District Judge to submit a report as to whether the custody should be handed over to the Petitioner-wife. Recently, in the case of Sarita Sharma Vs. Sushil Sharma, the Supreme Court disapproved the order of the High Court by which the husband's petition for custody of the child was allowed. The Supreme Court observed, "What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court have directed the Respondents to initiate appropriate proceeding in which such an inquiry can be held." Thus, it is not advisable to finally adjudicate upon the

inter se claim of the parties. Accordingly, our proposed order will not in any way affect the rights of the parties to get an appropriate declaration from a competent Court in a Guardianship proceeding under the Guardians and Wards Act in future.

5. So far as the present petition is concerned, there is no dispute about the age of the child being 14 months as at present. When the petition was filed, he was ten months old. The question of interest or welfare of the child in the sense the term "interest" or "welfare" is ordinarily understood, therefore, does not arise. That occasion would arise after the child attains a certain age. Being an infant, 14 months old-an age at which he should be in the lap of the mother, there must be some cogent reason for allowing the custody to the father. There is no substitute for love and affection which a mother can give to her child, the lack of which may have an enduring effect. Though there are female members in the Respondent family who can look after the child, that may not match the kind and extent the love and affection which a natural mother can give to her child. u/s 6 of the Hindu Minority and Guardianship Act, the natural guardian of a boy is the father but custody of the child upto five years shall ordinarily be with the mother. Having talked to the Petitioner, as also Respondent No. 2, we were satisfied that the Petitioner would properly look after the child. She is an educated lady with ambition to start law practice, and we see no reason why she should be denied custody for the present.

6. In the facts and circumstances, we are of the view that the custody of the child should remain with the Petitioner until adjudication of the dispute by a competent Court in a guardianship proceeding.

7. Two things we would like to clarify. Firstly, we began by saying that father's custody of the child cannot be said to be illegal and, therefore, the Petitioner may not be entitled to the custody of her son. This was our initial reaction and we said so keeping in view the principles underlying exercise of habeas corpus jurisdiction. But it does not mean that the Court should refuse to exercise its jurisdiction in all cases. As a matter of fact, in the case of *Sarita Sharma v. Sushil Sharma* (supra) the wife had taken her children to India in violation of order of an American Court. While allowing her claim and setting aside the order of the High Court which was in favour of the husband, the Court observed that the decree passed by an American Court, though a relevant factor, cannot override the consideration of the welfare of the minor child. The Court expressed doubt that the husband would be in a position to take proper care of the children as they were so young. The Court noticed that one of them was female child five years old. Observing that ordinarily a female child should be allowed to remain with the mother so that she can be properly looked after, and though the elder child was male, the Court thought that if the female child is to stay with the mother it would be in the interest of both to stay together with the mother.

8. In *Gohar Begam Vs. Suggi alias Nazma Begam and Others*, the Supreme Court observed while dealing with the question of custody in a proceeding u/s

491 of the Criminal Procedure Code, 1898 that existence of alternative remedy under the Guardian and Wards Act is no bar to exercise of jurisdiction under Article 226 of the Constitution. In Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, the Supreme Court observed that though u/s 6 of the Hindu Minority and Guardianship Act, the father is the natural guardian, it cannot supersede paramount consideration as to what would be conducive, to the welfare of a child. As already mentioned above, Section 6 of the Hindu Minority and Guardianship Act contemplates that the custody of a child upto five years of age should ordinarily be with the mother.

9. The second thing that we would like to clarify is that in course of hearing of the case while allowing temporary custody of the child to the Petitioner on 20th May 2002, we indicated that on the expiry of the period the custody may be restored to the father. We said so orally without recording it in the ordersheet with the hope that it would help in restoration of amicable relationship between the parties, but that was not to be. The further hearing of the case and our conversation with the parties in person made us not only abandon our effort for settlement but also conclude that the custody of the child should be with the mother i.e. the Petitioner, at least for the present.

10. In the facts and circumstances, the interim order passed on 20.5.2002 is made absolute and it is directed that the custody of the child will remain with the Petitioner until any appropriate declaration by the competent Court in Guardianship proceeding in accordance with law. It is made clear that any observation made by us in our present order will not cause prejudice to parties in such a proceeding.

11. In the result, the petition is allowed.