

(1999) 03 CAL CK 0017
In the Calcutta High Court
Case No : Writ Petition No. 1260 (W) of 1999

Smt. Alo Rani Saha

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 01-03-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 200
Penal Code, 1860 (IPC) — Section 120B, 420

Citation : (1999) CriLJ 3112

Hon'ble Judges : Nure Alam Chowdhury, J;Gitesh Ranjan Bhattacharjee, J

Bench : Division Bench

Advocate : Surpradip Roy and D.N. Bose, Aniruddha Sen, for the Appellant;Sekhar Basu, Debasish Roy and Swapan Kr. Mallick and Kazi Safiullah, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Gitesh Ranjan Bhattacharjee, J.—This application has been described in the cause title as an application under Article 226 for a writ in a nature of habeas corpus or any other appropriate writ.

2. The petitioner Smt. Alo Rani Saha is the mother of one Smt. Subhra Saha who gave birth to a child at the Nil Ratan Sarkar Medical College Hospital on 21-11-96. The petitioner's contention is that her daughter Smt. Subhra gave birth to a healthy male child and this was also initially intimated to her, but later she was informed that Subhra gave birth to a dead female child. It is the contention of the petitioner that Subhra gave birth to a healthy male child but by conspiracy and in connivance with the doctors and other staff of the hospital Subhra's male child was given to respondent No. 13 Smt. Iti Ghosh, the wife of Respondent No. 14, Kajal Ghosh and since then the said respondent Nos. 13 and 14 are detaining Subhra's male child claiming the same to be their own child. A complaint was lodged by the petitioner in the matter on the basis of which an FIR

was recorded at the Entali P. S. and Entali P. S. case No. 275 dated 23-11-96 u/s 120B/ 420, I. P. C. was started against the present respondent Nos. 13 and 14 and others and investigation was thereupon taken up by police. In course of investigation the investigating officer prayed before the Additional Chief Metropolitan Magistrate, Sealdah for permission to get DNA test done for ascertaining the paternity of the disputed male child. The learned Magistrate allowed that prayer and the matter was referred to an expert, namely, Dr. U. K. Kasyap, Deputy Director of the Department of Chemical Examination, Forensic Laboratory, Calcutta and in due course Dr. Kasyap, who is admittedly an expert in the matter held the DNA test and submitted his report of such test. It appears that the investigating officer submitted a final report before the Magistrate after closing the investigation. It also appears that the DNA test held by Dr. Kashyap did not support the claim of parentage of the male child as made by and on behalf of Smt. Subhra Saha. It further appears that the petitioner filed a narazi petition before the learned Addl. Chief Judicial Magistrate and the learned Addl. Chief Judicial Magistrate after hearing the parties and after considering the case diary and the DNA test report etc. recorded a finding that he did not find any justification to disbelieve the DNA test report of Dr. Kasyap and he accepted the final report submitted by the police by his order dated 19-11-98.

3. Thereafter the petitioner has filed the present application for habeas corpus praying for production of the male child and for appointment of another "impartial" doctor or agency for conducting a fresh DNA test under the direct control of this Court with a further prayer that if such second DNA test report supports the claim of the petitioner in that event the Court may direct handing over of the male child to the petitioner's daughter. It may be mentioned here that on an earlier occasion also the petitioner filed another habeas corpus petition before this Court in the self-same matter being W. P. 16723(W) of 1998 which was disposed of by a Division Bench of this Court by order dated 14-9-98 recording that it was not considered to be a fit case, in the circumstances, for habeas corpus. That habeas corpus petition was dismissed summarily. It was however made clear in that order that this court on that petition did not enter into the merit of the matter which remained open to be decided by the concerned Court. The petitioner has now again. came up before this Court by this second application for a writ of habeas corpus, etc. In our opinion this is not at all a fit case where this Court should exercise its habeas corpus jurisdiction. A criminal investigation was started in the matter, as we have seen. A DNA test was also held in course of the investigation under the order of the Magistrate as a part of the investigatory exercise. The matter was then considered by the learned Magistrate and as we have seen the petitioner also filed a narazi petition against the final report submitted by the I. O. The learned Magistrate after considering the matter found no reason to disbelieve or discard the DNA test report and accordingly accepted the same as well as the final report. Now if the petitioner were aggrieved by that order of acceptance of the final report as passed by the learned Magistrate it was open and rather procedural proper for him to move the

Appropriate Court (may be the Court of Session or even the High Court) against the said order in its criminal revisional jurisdiction. Instead of doing that he has approached this court in its writ jurisdiction with a fresh habeas corpus petition for a fresh DNA test thereby trying to overreach and bypass the result of the criminal investigation held in this matter which has received the stamp of judicial approval in the order of a competent judicial Magistrate who has jurisdiction to pass the order. If aggrieved by the said judicial order of the Magistrate which cannot be said to be an order without jurisdiction, the petitioner's remedy lies in moving the appropriate court in its criminal revisional jurisdiction against that order. This habeas corpus petition is inappropriate in the facts and circumstances obtaining here.

4. The petitioner in this connection however relies upon the decision of this Court in *Lakhichand Paswan v. The State of West Bengal* C. O. 15487 (W) of 1993 1998 (2) Cal LJ 155 t (commonly known as *Bikhari Paswan* case). The facts and circumstances in that case were totally different and we do not understand how that case helps the petitioner in the present case. There is no doubt that the writ jurisdiction is indeed plenary and wide. It is however needless to say that the question whether any application for habeas corpus will be appropriate in a case depends upon the facts and circumstances of the case. It may be noted here that the *Bikhari Paswan* case was also ultimately referred by the, writ court to the Chief Judicial Magistrate for registering a complaint u/s 200 of the Code of Criminal Procedure. On the other hand the learned Advocate for the private respondents Nos. 13 and 14 has referred to certain judicial pronouncements in support of his submission challenging the present writ petition, namely, the Supreme Court decisions in *D.R. Rao v. State of Orissa* 2197 (Sic), *Janardan Reddy and Others Vs. The State of Hyderabad and Others*, , *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, decision in *Bohar Singh Vs. State of Punjab and Another*, the decision of this Court in *Suresh Hazra Vs. State of West Bengal and Others*, Be that as it may, in the facts and circumstances of our present case, which we have discussed earlier, we do not consider to be a fit case for exercise of habeas corpus jurisdiction and that too for directing second DNA test.

5. Accordingly we dismiss the present application. We are however making it clear that we do not record any opinion about the merit of the petitioner's case vis-a-vis the result of the criminal investigation and the order passed by the learned Magistrate in that proceeding except that the order of the Magistrate cannot be said to be without jurisdiction.

Nure Alam Chowdhury, J.

6. I agree.