2024 INSC 610

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2024
(Arising out of SLP(Criminal) No. 5171 of 2024)

GAUTAM KUMAR DAS ...APPELLANT(S)

VERSUS

NCT OF DELHI AND OTHERS ...RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

1. Leave granted.

2. The present appeal challenges the final judgment and order dated 3rd April 2024 passed by a Division Bench of the High Court of Delhi in Writ Petition (Crl.) No. 416 of 2024, whereby the High Court disposed of the petition filed by the appellant, seeking to obtain the custody of his minor daughter from the alleged unlawful custody of respondent Nos. 5 and 6 (sisters-in-law of the appellant), by granting liberty to the parties to approach the family court of competent jurisdiction for seeking custody of the child in

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Reason:

question.

3. The facts, in brief, giving rise to the present appeal are as given below:

3.1 On 27th January 2012, the appellant married one Ms. Subrata Das and out of the wedlock two children were born – the first child, Master Divyanshu Das, on 11th September 2013, and the second child, Ms./Baby Sugandha Das, on 20th April 2021.

3.2 When their daughter was only 10 days old, the appellant unfortunately lost his wife on 30th April 2021, due to Covid-19 infection. Shortly thereafter tragedy struck the appellant once again as he lost his father on 13th May 2021, due to Covid-19 infection.

3.3 Grieving the loss of his loved ones, the appellant, took help from respondent No. 5, who is his sister-in-law, in taking care of his children. The appellant handed over the custody of his children to his sister-in-law as an interim/stop-gap solution, to see through the difficult period that he was undergoing on account of loss of his wife and father.

3.4 After some time, the custody of the minor son was given

back to the appellant, but the custody of the minor daughter was sought to be kept by respondent No. 5 on the ground that the girl child was still quite young and would require the care and attention of a female for few more months. The custody of the minor daughter, as a result, continued to be with respondent No. 5.

3.5 Respondent No. 5, thereafter, started refusing to let the appellant meet the minor daughter on one pretext or the other. She also took the minor daughter to her maternal home at Belda, West Bengal, where custody of the minor daughter was handed over to respondent No. 6.

3.6 The appellant, in the meanwhile, married again in order to provide his children with the care and attention of a female. He again approached respondent No. 5 to get back the custody of his minor daughter, but the same was refused again.

3.7 Aggrieved by the sequence of events, the appellant on 7th July 2023, filed a case under Section 10 of the Guardians and Wards Act, 1890, being Case No. GP/71/2023 seeking custody of his minor daughter. The appellant also filed two complaints, one in Delhi and the other one in Belda, West

Bengal, but no action was taken on them.

3.8 The appellant, thereafter, on 30th January 2024, filed a Writ Petition before the High Court of Delhi being W.P. (Crl.) No. 416 of 2024 seeking custody of his minor daughter from respondents Nos. 5 and 6.

3.9 Pursuant to the order of the High Court dated 7th February 2024, the appellant withdrew his case under the Guardians and Wards Act. The Division Bench of the High Court, thereafter, interacted with the parties and referred the matter to mediation to find out a workable solution. Taking into consideration the report of the mediator, the Division Bench arrived at an interim arrangement for visitation rights. However, vide final judgment and order, the High Court disposed of the writ petition by granting liberty to the parties to approach the family court of competent jurisdiction.

3.10 Aggrieved thereby, the appellant approached this Court. Vide order dated 16th April 2024, this Court issued notice and directed that the minor daughter shall remain in Delhi. Vide order dated17th May 2024, this Court, on a *prima facie* consideration of the facts, was of the view that the appellant has valid grounds to claim the custody of his minor

daughter. However, before arriving at a final conclusion, this Court thought it fit to give proper opportunity to the appellant to win over the love and affection of his minor daughter and accordingly gave visitation rights to the appellant, his second wife and his son. The interim arrangement arrived at by this Court has continued till today.

4. We have heard Shri Saurav Agrawal, learned counsel appearing on behalf of the appellant and Shri Hirein Sharma, learned counsel appearing on behalf of respondent Nos. 5 and 6.

5. Shri Agrawal, learned counsel appearing on behalf of the appellant submitted that the High Court has grossly erred in dismissing the petition. He submitted that the appellant is the only surviving biological parent of the minor daughter Sugandha Das. He submitted that the appellant is a natural guardian of the minor child Sugandha Das, whereas respondent Nos. 5 and 6 are neither the legal guardian nor have any legal right or authority over the minor girl Sugandha Das. He further submitted that the appellant, who is a natural guardian, cannot be made to run from pillar

to post to seek custody of his own child. He submitted that the view taken by the High Court is contrary to the law laid down by this Court in the case of ***Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others***[1].

6. Shri Agrawal further submitted that it is also in the interest of the minor child Sugandha Das to stay with her father who is stationed in Delhi whereas respondent Nos. 5 and 6 are residing in a small village Belda in West Bengal. He submitted that the minor child Sugandha Das would also be deprived of the company of her biological brother.

7. Shri Agrawal, relying on various photographs, submitted that the minor child Sugandha Das has gelled well with the appellant, his son and his wife. The learned counsel therefore pressed for quashing and setting aside of the impugned order passed by the High Court with a direction to the respondents to immediately hand over the custody of the minor child Sugandha Das to the appellant.

8. Shri Sharma, learned counsel appearing on behalf of respondent Nos. 5 and 6 submitted that the appellant, having withdrawn the petition filed under the Guardian and

[1] **(2019) 7 SCC 42 : 2019 INSC 630**

Wards Act, 1890, could not have filed a habeas corpus petition before the High Court. It is submitted that the appellant and his family members were ill-treating Late Ms. Subrata Das, first wife of the appellant. It is submitted that it is the appellant who had handed over the custody of the minor child Sugandha Das voluntarily to respondent Nos. 5 and 6. In the written submissions, various other allegations have also been made by respondent Nos. 5 and 6 against the appellant. The learned counsel has relied on the judgments of this Court in the cases of ***Dr. (Mrs.) Veena Kapoor v. Shri Varinder Kumar Kapoor***[2]***, Nirmala v. Kulwant Singh and Others***[3] ***and Athar Hussain v. Syed Siraj Ahmed and Others***[4].

9. Before we come to the facts of the present case, it would be apposite to refer to the observations of this Court in the case of ***Tejaswini Gaud*** (supra), wherein this Court was considering almost similar facts as have arisen in the present case. In the said case also, after the marriage, the wife was detected with breast cancer and the husband had fallen ill with Tuberculosis Meningitis and Pulmonary Tuberculosis.

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[2] **(1981) 3 SCC 92**
[3] **2024 SCC OnLine 758 : 2024 INSC 370**
[4] **(2010) 2 SCC 654 : 2010 INSC 7**

While the husband was undergoing treatment, one of the sisters of the wife and her husband took the minor child Shikha and her ailing mother to their residence at Mumbai. During the treatment, the wife succumbed to her illness. The minor child continued to be in the custody of the sister of the wife and her husband. Since the father was denied the custody of the minor child, he approached the High Court by way of writ petition seeking writ of habeas corpus. The High Court allowed the petition and directed the custody of the minor child to be handed over to the husband. Being aggrieved thereby, the sister of the wife and her husband approached this Court. Before this Court, an objection was taken to the very tenability of the petition of habeas corpus filed under Article 226 of the Constitution of India. Rejecting the said argument, this Court observed thus:

> "**21.** In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father,

being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

10. In the said case, after considering the earlier pronouncements, this Court further observed thus:

"**34.** As observed in *Rosy Jacob* [*Rosy Jacob* v. *Jacob A. Chakramakkal*, (1973) 1 SCC 840] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."

11. Like the facts in the case of ***Tejaswini Gaud*** (supra), the facts in the present case are also peculiar. The appellant's wife died due to COVID infection and as such, he was forced to give the custody of the minor child Sugandha Das to respondent Nos. 5 and 6, who are the sisters of the deceased wife. Looking at the very tender age of the child Sugandha Das at that time, the appellant could not have looked after her. However, the appellant was looking after his son Divyanshu Das, who was relatively older. Subsequently, the appellant remarried. Now, he and his wife can very well look after the minor girl Sugandha Das. A perusal of the photographs placed on record would also reveal that pursuant to the visitation rights granted by the High Court and this Court, the minor child has gelled well with the family and the family of four appears to be happy.

12. Insofar as the fitness of the appellant is concerned, he is well educated and currently employed as Assistant General Manager (Class A Officer) in Central Warehousing Corporation, Delhi. The appellant's residence is also in Delhi whereas respondent No. 6 to whom the custody of the minor child was handed over to by respondent No. 5 is residing at a

remote village in West Bengal. Apart from taking care of his children, the appellant can very well provide the best of the education facilities to his children. The child Sugandha Das, who lost her mother at tender age, cannot be deprived of the company of her father and natural brother. At the relevant time, the appellant had no other option but to look upon the sisters of his deceased wife to nurture his infant child.

13. In our opinion, merely because of the unfortunate circumstances faced by the appellant as a result of which, respondent Nos. 5 and 6 were given the temporary custody of the minor child Sugandha Das and only because they looked after her for few years, the same cannot be a ground to deny the custody of the minor child to the appellant, who is her only natural guardian.

14. Insofar as the allegations made against the appellant by respondent Nos. 5 and 6 are concerned, it appears that they have been made only as an afterthought, and especially after the appellant started asserting his claim for the custody of his minor daughter Sugandha Das. Insofar as the judgments of this Court on which respondent Nos. 5 and 6 have relied upon, we can only say that there cannot be any straight-

jacket formula in the matters of custody.

15. Recently, this Court, in the case of ***Nirmala*** (supra) in paragraph 16 has also observed that no hard and fast rule can be laid down insofar as the maintainability of the habeas corpus petition in the matters of custody of minor child is concerned. It has been held that as to whether the writ court should exercise its jurisdiction under Article 226 of the Constitution of India or not will depend on the facts and circumstances of each case.

16. However, it is to be noted that a common thread in all the judgments concerning the custody of minor children is the *paramount welfare of the child*. As discussed hereinabove, we find that, apart from the appellant being the natural guardian, even in order to ensure the welfare of the minor child, she should live with her natural family. The minor child is of tender age, and she will get adapted to her natural family very well in a short period. We are therefore inclined to allow the appeal.

17. In the result, we pass the following order:

(i) The appeal is allowed;

(ii) The impugned judgment and order of the High Court is quashed and set aside;

(iii) Respondent Nos. 5 and 6 are directed to handover the custody of the minor child Sugandha Das forthwith; and

(iv) We, however, permit respondent Nos. 5 and 6 to meet the minor child Sugandha Das at the residence of the appellant every Wednesday between 04:00 pm and 06:00 pm.

18. Pending application(s), if any, shall stand disposed of.

.....J.
(B.R. GAVAI)

.....J.
(K.V. VISWANATHAN)

NEW DELHI;
AUGUST 20, 2024