2024 INSC 163

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2024
(Arising out of Special Leave Petition (Crl.) No.7290 of 2023)

SHAZIA AMAN KHAN
AND ANOTHER **... Appellant(s)**

VERSUS

THE STATE OF ORISSA AND OTHERS **... Respondent(s)**

J U D G M E N T

Rajesh Bindal, J.

Leave granted.

2. This Court has been called upon to decide about the issue regarding custody of a minor child in parens patriae jurisdiction.

3. The child at present is 14 years of age, living since birth with the appellants and respondent No.10.

4. Aggrieved against the order[1] passed by the High Court[2] in a Writ Petition[3] filed by respondent No.2, who is biological father of the child, for restoration of her custody, namely, Sumaiya Khanam in his favour, the present appeal has been filed.

5. The High Court directed the Registrar (Judicial) of the Court to recover the child from the custody of appellant No. 2 and respondent No. 10, particularly from appellant No. 1 and respondent No. 10 and to hand over to respondent No.2. The authorities of the State Government were also directed to execute the writ of Habeas Corpus and hand over the child to respondent No. 2.

6. Learned counsel for the appellants submitted that twin daughters were born to respondent No. 2 and his wife on 20.03.2010. The respondent No. 2 at that time was living at Rourkela. The children were born at Ranchi where their maternal grand mother was residing. As he was unable to take care of twins, on his request, one was left at Ranchi. Appellant No. 2 is the real sister of respondent No. 2. As the maternal grand mother could not take care of the small child, she was handed over

[1] Order dated 03.04.2023
[2] High Court of Orissa at Cuttack
[3] WPCRL No. 160 of 2021

to the appellant No. 2. This happened when the child was merely 2-3 months old. Ever since then, she is living with her. No issue was raised by respondent No. 2 at any time. It was only in the year 2015, a complaint was filed by respondent No. 2 with the police regarding kidnapping of the child against the appellants and respondents No. 7 and 9. As it was not a case of kidnapping, as alleged, closure report was filed by the police on 31.08.2016, which was accepted by the Court, *vide* order dated 11.02.2017. No objection was raised by respondent No. 2 to the acceptance of the closure report. However, a private complaint[4] dated 27.03.2017 was filed by respondent No. 2 under Sections 363, 346, 120-B IPC with reference to the custody of the child by taking a different stand. The aforesaid complaint is stated to be still pending. In a petition[5] filed by the appellants and respondents No. 7 and 9 before the High Court seeking quashing of the complaint, further proceedings in the complaint have been stayed.

6.1 Immediately after filing of the aforesaid complaint by the respondent No. 2, wife of respondent No.2, namely, biological mother of

[4] ICC Case No. 120 of 2017
[5] CRLMC NO. 549 of 2019

the child, filed petition[6] in the High Court of Judicature at Patna praying for issuance of directions to the official respondents to recover the child from the wrongful confinement of the private respondents therein. However, when no case could be made out, the aforesaid petition was dismissed as withdrawn with liberty to avail remedy in accordance with law. The fact remains that thereafter the mother of the child did not avail any other remedy for seeking custody of the child. In fact, they were not interested at all. It was the litigation only for the sake of it. The child was left by respondent No. 2 with her maternal grand mother on account of the financial difficulty faced by him at that time.

6.2 More than four years thereafter, respondent No. 2 filed a Writ Petition in the High Court praying for custody of the child. While entertaining the Writ Petition, the High Court, vide order dated 11.02.2022, noticed the issues need to be examined in the Writ Petition. However, at the time of hearing the matter, the High Court framed different issues, as have been noticed in paragraph No. 57 of the impugned judgement.

[6] Criminal Writ Jurisdiction Case No. 1232 of 2017

6.3 He further submitted that number of documents were placed by the appellants before the High Court which clearly establish that the child ever since is living with the appellants and respondent No. 10. At the time of her birth, her name was Sumaiya Khanam, which was later on changed to Dania Aman Khan. A Petition[7] has been filed under the Guardianship and Wards Act, 1890 by appellant No.1 and respondent No.10, which is stated to be pending. However, he submitted that in the present proceedings, the appellants are only raising the issue regarding custody of the child and not guardianship. He fairly submitted that there is no system of adoption of child in Mohammaden law. It is only Kafalah, in terms of which only custody can be given to another person, however, the child does not sever relations with biological parents.

6.4 Learned counsel for the appellants on instructions categorically stated that appellant No. 1 and respondent No. 10 have two more children. The child, of which they have the custody ever since her birth will have equal rights along with two other children. She will not be discriminated in any manner whatsoever.

[7] Guardianship Case No. 23 of 2016 before the Court of Principal Judge, Family Court, Patna

6.5 Further raising the issue regarding the conduct of respondent No. 2, he submitted that firstly a petition for Habeas Corpus was filed by the wife of respondent No. 2 before the High Court of Judicature at Patna five years after the child had been living with appellant No. 1 and respondent No. 10. The same was dismissed as withdrawn. Four years thereafter, similar petition was filed by respondent No. 2 before the High Court of Orissa. Time gap shows that the respondent No. 2 is not interested in custody of the child.

6.6 He further submitted that to show their bonafide, appellant No. 1 and respondent No. 10 are ready and willing to deposit a sum of ₹10,00,000/- in FDR in bank in her name and also transfer property having market value of about ₹50,00,000/-. At present, the child is grown up. She is 14 years of age. She is capable of forming an opinion about her best interest. The welfare of the child is of paramount consideration and not the rights of the parties. Stability is most important factor as any order passed by this Court may dislodge the child from the family where she is settled for the last 14 years. Her transplantation at this stage may not be in her best interest. It is the welfare of the child and not the personal law or the statute which has paramount consideration, when the parties are

fighting. In support of his argument that it is only the best interest of the child which is to be considered in such matters and also the difference between custody and guardianship, reliance was placed upon the judgment of this Court in **Athar Hussain v. Syed Siraj Ahmed and others**[8].

7. In response, learned counsel for respondent No. 2 submitted that it is not the case of abandonment of a child, as is sought to be projected by the appellants now. No parents will ever think of that, what to talk of actually doing it. The child was left with her maternal grand mother and thereafter handed over to appellant No.2 for her initial upbringing when she was 3-4 months old. She further submitted that when repeated requests for returning back the child were not acceded to, respondent No. 2 did not have any choice but to lodge an FIR in which a closure report was filed and accepted also. She further submitted that even during this period of five years, the child had been coming to her parents off and on. It was further submitted that after the closure report in the aforesaid FIR was accepted, respondent No. 2 filed a complaint dated 27.03.2017 under Sections 363, 346, 120-B IPC with reference to the

[8] (2010) 2 SCC 654

custody of the child. The aforesaid complaint is stated to be still pending. In a petition[9] filed by the appellants and respondents No. 7 and 9 seeking quashing of the complaint, further proceedings in the complaint have been stayed by the High Court of Orissa. Immediately after filing of the aforesaid complaint by respondent No. 2, his wife, i.e., biological mother of the child, filed the petition in the High Court of Judicature at Patna praying for issuance of directions to the official respondents to recover the child from the wrongful confinement of the private respondents therein. The aforesaid petition was dismissed as withdrawn with liberty to avail any other remedy in accordance with law.

7.1 Explaining the delay in filing the petition before the High Court, learned counsel for respondent No. 2 submitted that it is was because of COVID pandemic. She further submitted that since 2015, the biological parents of the child have not even been able to meet her. Respondent No. 2 was and is able to take care of all the needs of the child and provide her best education, as is being provided to the sister of the child as twins were born. It was further argued that appellant No. 1 got married with respondent No. 10, who is a stranger to the family. In terms

[9] CRLMC NO. 549 of 2019

of Mohammedan law, custody of the child cannot be given to the stranger, who is beyond prohibitory degree for marriage but she fairly submitted that they all are living in a joint family.

7.2 It was further argued that one of the prayers made by the appellants before this Court is that appellant No. 2 be permitted to stay for some time with the child in case custody is handed over to respondent No. 2 so that the child settles in new atmosphere. Respondent No. 2 does not have any objection to the fair offer made by the appellants. In fact, when the child was handed over to appellant No.1, she was un-married. However, thereafter she got married and is having two children. The child may be discriminated. If the custody of the child is handed over to respondent No. 2, the distance between Patna and Rourkela being not much, the appellants are always welcome to visit the child. The question is also of the identity of the child which has been lost in the process. If she comes back, she will also have love, affection and company of her twin sister. In support, reliance was placed upon **Tejaswani Gaud v. Shekhar Jagdish Prasad Tewari**[10] and **Rohith Thammana Gowda v. State of Karnataka and others**[11]. The Prayer is for dismissal of the appeal.

[10] AIR 2019 SC 2318
[11] AIR 2022 SC 3511

8. Heard learned counsel for the parties and perused the relevant referred record.

9. The undisputed facts on record are that twins were born to respondent No. 2 and his wife on 20.03.2010. One of them, the custody of whom is in question, has undisputedly been living with appellant No. 2 ever since she was 3-4 month old and thereafter with the family. Presently, she is about 14 years of age. It is not a case in which any of the parties is claiming adoption which otherwise is not permissible under Mohammedan law. Guardianship is also not being claimed. It is only the dispute regarding custody of the child.

10. Before we deal with the issue on merits, we deem it appropriate to refer to the legal position on the issues.

11. This Court in **Athar Hussain v. Syed Siraj Ahmed and others'case (supra)** had elaborated the concept of custody, guardianship and stability of child, while holding as under:

> "31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the GWC Act, unless the father is not fit to be a guardian, the Court

has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

xx xx xx

37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in **Mausami Moitra Ganguli v. Jayant Ganguli**, (2008)7 SCC 673. This Court held:

> "24.....We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed:

> "26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. *In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet* and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."
>
> *[Emphasis supplied]*

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41. However, the High Court of Rajasthan held that in the light of Section 19 which bars the Court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint any maternal relative as a guardian, even though the personal law of the minor might give preferential custody in her favour. As is evident, the aforementioned decision concerned appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed

by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the Court is not bound by the bar envisaged under Section 19 of the Act.''

[*Emphasis supplied]*

12. This Court in **Mausami Moitra Ganguli v. Jayant Ganguli**[12], opined that the stability and security of the child is an essential ingredient for full development of child's talent and personality. Relevant paragraph thereof is extracted below:

> ''23. Having bestowed our anxious consideration to the material on record and the observations made by the courts below, we are of the view that in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands of the father. In our opinion, the stability and security of the child is also an essential ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had shifted from Chandigarh some time back. Earlier she was teaching in some school

[12] (2008) 7 SCC 673

at Calcutta. Admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad.

[Emphasis supplied]

13. In **Nil Ratan Kundu and another v. Abhijit Kundu**[13], this Court laid down the principles governing custody of minor children and held that welfare of the children is to be seen and not the rights of the parties by observing as under:

"Principles governing custody of minor children

53. 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 custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane 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

[13] (2008) 9 SCC 413

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.

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55. We are unable to appreciate the approach of the Courts below. This Court in catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents."

[*Emphasis supplied]*

14. This Court has consistently held that welfare of the child is of paramount consideration and not personal law and statute. In **Ashish Ranjan v. Anupam Tandon and another**[14], this Court held as under:

> "19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

15. This Court in **Roxann Sharma v. Arun Sharma**[15], opined that the child is not a chattel or ball that it is bounced to and fro. Welfare of the child is the focal point. Relevant lines from para-No. 18 are reproduced hereunder:

> "18.....There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should

[14] (2010) 14 SCC 274
[15] (2015) 8 SCC 318

ordinarily be with the Mother and this expectation can be deviated from only for strong reasons…..''

16. Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of. Reference can be made to **Rohith Thammana Gowda v. State of Karnataka and others' case (supra).** It was held as under:

> ''13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark.''

17. In the case in hand, *vide* order dated 12.12.2023, we had called the child in Court. We had interacted with the child, the appellants and respondent No. 2 individually in chamber. We found the child to be quite intelligent, who could understand her welfare. She categorically stated that she is happy with the family where she has been brought up. She has

other brother and sister. She is having cordial relations with them. She does not wish to be destabilized.

18. The judgment in **Tejaswani Gaud v. Shekhar Jagdish Prasad Tewari's case (supra)**, relied upon by learned counsel for respondent No. 2 does not come to her rescue for the reason that age of the child in that case was merely five years. It is a case which lays down guidelines as to how custody of the child is to be handed over.

19. The fact that appellant No. 1, when custody of the child was handed over to her, was un-married and is now married having two children will also not be a deterrent for this Court to come to the conclusion that best interest of the child still remains with the appellant No. 2 as the child is living with her ever since she was 3-4 months old and is now about 14 years of age having no doubt in her mind that she wishes to live with them.

20. In view of our aforesaid discussions, we find that the welfare of the child lies with her custody with the appellants and respondent No. 10. This is coupled with the fact that even she also wishes to live there. Keeping in view her age at present, she is capable of forming an opinion in that regard. She was quite categoric in that regard when we interacted

with her. She cannot be treated as a chattel at the age of 14 years to hand over her custody to the respondent No.2, where she has not lived ever since her birth. Stability of the child is also of paramount consideration.

21. The appeal is accordingly allowed. The impugned order passed by the High Court is set aside, as a result of which the writ petition filed by respondent No. 2 in the High Court is dismissed. We expect the appellants to adhere to the stand taken by them during the course of arguments, as noticed above.

.....J.
(C.T. RAVIKUMAR)

.....J.
(RAJESH BINDAL)

New Delhi
March 04, 2024.