

Ct. 08  
Item No.05  
30.11.2023  
**(Suvendu)**

**WPA (H) 18 of 2023  
With  
CAN 1 of 2023**

**Momataj Molla  
Vs.  
The State of West Bengal & Ors.**

Mr. Debajyoti Deb  
Mr. Tamal Ghosh  
Ms. Somdyuti Parekh  
.....for the petitioner

Mr. Sabir Ahamed  
Mr. Simanta Kabir  
.....for the State

Md. Younush Mondal  
.....for the private respondent/ applicant

**Re. CAN 1 of 2023**

The grandparents have filed this application for custody of the child and appointment of a Special Psychologist to assess the mental and health condition of the child. This is an application filed for modification of the order dated 22<sup>nd</sup> March, 2023.

Momataj Molla is the mother of the child. She filed a writ of *Habeas Corpus* to produce her son who is alleged to be in the illegal custody of

the petitioner's in-laws being the respondent nos. 4 and 5.

The coordinate Bench after recording the submissions of the parties arrived at a finding that there are materials to infer that the child would be better placed if he is allowed to reside with his mother. It was further observed that the *Habeas Corpus* proceeding is not to justify or examine the illegality of the custody.

It is a process in which the Court can invoke its extraordinary jurisdiction for the best interest of the child. Although in the child custody matters a detailed enquiry is required, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction. The High Court while dealing with the petition for issuance of Writ of *Habeas Corpus* concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position that the welfare of the child is of paramount consideration [see Nithya Anand Raghavan -vs- State (NCT of Delhi) & Anr.; 2017 (8) SCC 454 relied in Yashita Sahu -vs- State of Rajasthan; 2020 (3) SCC 67].

In exercise of such power and on consideration that in exceptional circumstances the Court can invoke its jurisdiction, following directions were passed.

“(a) The private respondents shall hand over the custody of the child to the petitioner at the petitioner’s residence at village -Chatrakhali, P.O. -Fulmalancha, Police Station -Basanti, District - South 24 Parganas, PIN - 743 329, where the petitioner is residing along with her parents, within a week from date;

(b) The petitioner is also directed to provide access through video conferencing on Fridays and Sundays to the respondent nos. 4 and 5 for conversation and interaction with the child during the period from 5.00 p.m. to 6.00 p.m.;

(c) The private respondent nos. 4 and 5 would also be at liberty to visit the child on the second and fourth Saturdays of every month for the period from 4.00 p.m. to 6.00 p.m. at the petitioner’s residence and during such visit, the petitioner and her family members shall

ensure the comfort of the said respondent nos. 4 and 5;

(d) The private respondent nos. 4 and 5 would also be at liberty to visit the child at the petitioner's residence on the day of the festivals and during such visit, the petitioner and her family members shall ensure the comfort of the said respondents."

In compliance of the aforesaid directions, the child was handed over to the petitioner by the private respondents. The order also provides the consequences of non-compliance of the said order.

It appears that vague and unsubstantiated allegations have been made with regard to non-compliance of the directions passed by the coordinate Bench. There is nothing on record to suggest that the mental and physical health of the child is deteriorating day by day.

In our view, it is an attempt to have a review of an order passed by a coordinate Bench taking into consideration of all the relevant factors involved in the matter. The child is of two and half years old and considering his tender age and that the child needs love, care and affection, mother is the most suitable guardian. In fact she is the natural guardian of the minor under the law. The

order passed by the coordinate Bench disposing of the *Habeas Corpus* petition does not conclusively decide or gone into in detail with regard to the custody of the child save and except the coordinate Bench has observed that “the child would be better placed if he is allowed to reside with his mother”. In the facts of the case it was needed. The petitioners have failed to substantiate its claim for custody as there is no change of circumstances.

On such consideration, we do not find any reason to modify the order dated 22<sup>nd</sup> March, 2023.

We, however, make it clear that this order shall not prevent the applicant to approach the appropriate Court in relation to the custody of the child.

The observations made in the order disposing of the *Habeas Corpus* petition shall not influence the Court in the event an application for custody of the child is filed with better materials.

CAN 1 of 2023 is accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertakings.

**(Uday Kumar, J.)**

**(Soumen Sen, J.)**

