

CASE NO.:
Writ Petition (crl.) 58 of 2003

PETITIONER:
Saihba Ali

RESPONDENT:
Vs.
State of Maharashtra & Ors.

DATE OF JUDGMENT: 24/07/2003

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:

O R D E R

In this petition under Article 32 of the Constitution of India, the petitioner primarily seeks a writ in the nature of habeas corpus directing respondent Nos.2 and 4 to produce her minor children and hand-over the custody of the said minor children to the petitioner along with their passports and travel documents. The petition is based on the fact that the petitioner is the natural mother and de facto guardian of the minor children and that her husband is serving a jail-term in the United States of America, and that she has obtained an order of the competent court in the USA for the custody of the minor children, therefore, their custody with the second respondent is an illegal custody, consequently she is entitled to the relief prayed for by her in the above petition.

Respondent No.4 who is the paternal grand-mother of the children in question, has filed a counter and has brought to our notice that the children in question are in her custody by virtue of an order made by a competent Family Court at Nagpur in a petition filed by her son to which petition the writ petitioner was a party, and though the said writ-petitioner has challenged the said order of the Family Court in appeal before the High Court of Bombay, Nagpur Bench, she withdrew the same, hence, the said order of the Family Court granting custody to her has become final so the custody of the children with her was not in any manner illegal, consequently the petition in the nature of habeas corpus is not maintainable. She also contended that the Family Court while granting the custody of the minor children to her has taken note of the order made by the court in the USA in regard to custody of the children which order the Family Court had held to be one without jurisdiction and not a decree, notice of which can be taken by Indian courts under section 13 of the CPC.

We have heard the arguments of the learned counsel for the parties and are in agreement with the submissions made on behalf of respondent No.4. The custody of the minor children having been awarded to the 4th respondent by a competent court, cannot be said to be an illegal custody, unless and until the petitioner gets that order set aside. Therefore, in our opinion, the petitioner cannot seek relief in this habeas corpus petition.

Learned counsel for the petitioner, however, submitted that the petitioner will take necessary steps to either get the order of the Family Court set aside or modified but till such

time she should be given the custody of the children since she has come all the way from the United States to be with them. He submitted that the writ petitioner-mother is a holder of post-graduate degree in English literature and has undergone training in child psychology. He also submitted that in Nagpur, she resides with her family and her brother is the Manager of a School, therefore, she is qualified to look after the children better than the 4th respondent who is now aged over 80 years and does not have the necessary help to look after these children. This argument of the learned counsel for the petitioner is rebutted by the learned counsel appearing for the 4th respondent who contends that ever since the order of the Family Court, the children are in the custody of the grandmother without there being any complaint of their welfare being in any manner either ignored or jeopardised. He also submitted that the petitioner who has since remarried has a child from her second wedlock and she having not challenged the order of the Family Court, cannot in the guise of this habeas corpus petition, seek interim custody of the children.

We are aware that having held that the petition in question is not maintainable, we cannot grant the custody of the children to the petitioner even though she is their mother. However, to do complete justice, we can pass such orders which is appropriate in the facts of the case as also in the interest and welfare of the minor children. Learned counsel for the 4th respondent in this regard submitted that there is already a consent order of the Family Court made on 15.9.1998 which gives the petitioner sufficient visitation rights which order has not been challenged by the petitioner, therefore, there is no need to pass any other order in regard to the petitioner's visitation rights.

Having considered the arguments addressed on this point, we think it is necessary to issue certain directions which may be in the nature of modification of the consent visitation rights given to the petitioner by the Family Court dated 15.9.1998. Among other things, we are inclined to pass the following order on the ground that the consent order referred to by learned counsel for respondent No.4 is of 15.9.1998 and a lot of time has passed since then and the children also have grown up and the writ petitioner has now been staying in India for a considerable length of time, therefore, in the interest of justice. we make the following order :

This order shall be in force till such time as the Family Court, Nagpur, on any application made by either of the parties thinks it appropriate to modify the same for good and valid reasons. The terms of this order granting visitation rights to petitioner will be as follows :

The petitioner herein â\200\223 Saihba Ali â\200\223 shall be entitled to take her children, namely, Nida, the minor daughter and Ali, the minor son, on every week day from 4.30 to 7.30 p.m. She shall then bring back the children to the house of their paternal grandmother and leave them in the custody of respondent No.4 or any other responsible person in that house.

On Saturdays and Sundays the children can be taken by the writ petitioner from the 4th respondent's residence from 12 Noon to 7 p.m. and brought back to the residence of respondent No.4 and handed-over to the custody of the 4th respondent or any other responsible person in the said house.

At present, the children are taking tuitions between 8 and

9.30 p.m. from Monday to Saturday which would be a burden on the children, therefore, the writ petitioner who claims to be qualified to give tuitions to the children with the assistance of her family, shall take necessary steps to coach/tutor the children during the time they are in her custody and the children shall not be subjected to any additional tuition.

The progress of the children in their studies shall be evaluated from their marks obtained by them and the report of the School teacher made based on the results of the examinations conducted by the School which we are told is in the month of November, 2003. We have been told that the immediate next examination will be in the month of August, but we think it will be too short a period to assess the effect of petitioner's tuition on the children's education. We are told that the passport of the petitioner is in the custody of the Family Court. It shall remain so until ordered otherwise by the said court.

Any deliberate or willful disobedience of the letter and spirit of this order would entail this order being revoked even by the Family Court.

As stated above, it will be open to the parties to make suitable application to the Family Court to make such changes as it thinks necessary or to make the regular final order in regard to the custody of the children.

Any change either in the nature of interim arrangement or as a final order will be made by the Family court on the materials produced by the parties without in any manner being influenced by this interim order. Parties are at liberty to make such application as they think appropriate before the Family Court. The writ petition is disposed of in the above terms.