

In Re: Madhab Chandra Saha

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Court : Kolkata

Decided On : Jul-19-1996

Reported in : AIR1997Cal123

Judge : S.N. Chakrabarty, J.

Acts : [Constitution of India](#) - Articles 226 and 311(2);; Hindu Minortiy and Guardianship Act, 1956 - Section 6;; [Hindu Marriage Act, 1955](#) - Section 13 and 13(B)

Appeal No. : Cri. Misc. No. 2100 of 1996

Appellant : In Re: Madhab Chandra Saha

Advocate for Pet/Ap. : Sukumar Ghosh and ;Sibdas Sidkar, Advs.

Judgement :

ORDER

1. This application for issuance of a writ of Habeas Corpus has been filed against the respondents directing them to produce Master Mukul Saha son and Kumari Bakul Sana, daughter, in this Court who are said to be aged about 14 and 12 years respectively. The petitioner and the respondent No. 1 were married on 22nd January, 1981. Out of the said Wedlock, one son and the daughter, who are named hereinbefore, were -born. The petitioner and his wife started living separately from 30th September, 1985. Thereafter, they filed an application before the District Judge Murshidabad which was registered as Mat. Suit No. 31 of 1988

and by a judgment and order dated 18th January, 1989, the said application was allowed. The said judgment reads thus:--

'Both the parties are present with their learned Advocates. The suit is heard and and the parties are examined on S.A.

This is a suit for divorce by mutual consent filed under Section 13(b) of the [Hindu Marriage Act, 1955](#).

The case of the parties in short is that they are Hindus and their marriage was solemnized according to Hindu Rites and Customs on 21-1-1981 at the residence of the wife's uncles's house at Krishnanaga Dist. Nadia. After manage they lived together as husband and wife and they became the parent of one son and one daughter. Due to unavoidable circumstances they are living separately from 30-9-1985 and there is no chance of the reconciliation. Naturally they have prayed to dissolve their marriage by mutual consent and they last lived together as husband and wife. As wife's residence at Berhampur in the district of Murshidabad within the jurisdiction of this Court there is also no instance of any collusion between them in the matter.

The wife said that she had relinquished all her claims in future for her as well as the maintenance of her children and she has received out of Court a draft of Rs. 20,000/-from the husband.

Court Fees paid are correct. Hence Ordered that the suit be decreed for divorce by mutual consent under Section 13(B) of [Hindu Marriage Act, 1955](#). The marriage tie between the parties is hereby dissolved.

The wife shall not prefer any claim for maintenance against the husband in future.'

2. This writ application has been filed on 17-4-1996 allegedly on the ground that the petitioner having come to learn that his children are not being well looked after and are not being sent to school. Mr. Ghosh, learned Counsel appearing on behalf of the petitioner, had also informed us that his client is ready and willing to remarry the respondent No. 1. Mr. Ghosh in support of his aforementioned contention that his client is entitled to issue writ Habeas Corpus, has relied upon the decision in

Gohar Begum v. Suggi @ Nazma Begum reported in : 1960 CriLJ164 and Capt. Dushyant Somal v. Smt. Sushma Somal reported in : 1981 CriLJ719 .

3. The admitted fact remains that the petitioner had not been living with his children since 1985 on obtaining a decree of divorce by mutual consent in terms of Section 13(B) of the [Hindu Marriage Act, 1955](#) as far back as on 13-2-1989. It is only after a period of more than seven years that the petitioner thought it fit to stake his claim of guardianship on the ground that his children have become major. The terms of mutual divorce as reproduced hereinbefore clearly show that the respondent No. 1 had foregone all claims of maintenance of her children only upon receipt of a sum of rupees twenty thousand from the petitioner. The petitioner therefore, must have disclaimed all responsibility so far as the children are concerned at that point of time. It is not dispute that a writ of -- Habeas corpus cannot be issued as a matter of course and particularly when the same is to be issued against a spouse. It is now well settled by various decisions of the Supreme Court of India as also of this Court that matter relating to guardianship of a children has to be considered keeping in view the paramount interest of the children himself although in law the father may be the guardian of his children. This Court in exercise of its jurisdiction under Article 226 of the constitution of India in such a situation cannot convert itself into a Court under the provision of Hindu Guardianship and Maintenance Act particularly in view the fact of the matter as noticed hereinbefore. Had the petitioner been serious in keeping his children with him, a clause to that effect would have been inserted in the said application under Section 13B of the Hindu Marriage Act. In any event, the petitioner could have laid his claim as soon as he become entitled thereto in terms of the provisions of the Hindu Minority and Guardianship Act. He had not chosen to do so. In Gohar Begum's case : 1960 CriLJ164 (supra), the petitioner thereof was claiming custody of her illegitimate child to which she was entitled to irrespective of the fact as to who was the father of the said child. It was in that situation, the Supreme Court held that the interest of the child would be better served if she is left with the custody of the appellant alone. In the instant case the petitioner does not have any absolute right under the provision of the Hindu Maintenance and Guardianship Act -- In Capt. Dushyant Somal's case : 1981 CriLJ719 (supra) the Supreme Court was dealing with a different situation. It itself held that there can be no question that

a writ of Habeas Corpus is to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. In that case the child in question was snatched away from lawful custody of other parent to whom Court has given such custody. Such an act on the part of the said parent was clear an act of contempt of Court and in the peculiar facts of that case, the apex Court held that an application under Art. 226 should be maintainable. It is now well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Each case must be judged on its own fact. It is also well known one additional or difference of fact may make a lot of difference in passing of judgment. Reference in this connection, may be made to the Regional Manager v. Pawan Kumar Dubey reported in : (1976) IILLJ266SC , wherein the Apex Court held 'we think that the principles involved in applying Art. 311(2) having been sufficiently explained in Shamsheer Singh's case, : (1974) IILLJ465SC (supra) it should no longer be possible to urge that Sughar Singh's case, : (1974) IILLJ260SC (supra) could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.' Mr. Ghosh has heavily relied upon Sec. 6 of the Hindu Minority and Guardianship Act. There cannot be any doubt whatsoever that in law the petitioner may be held to be the lawful guardian. But as we have observed earlier that the Court may make an exception thereto keeping in view the welfare of the child and this the petitioner does not have an absolute right to get custody of the children irrespective of any circumstances whatsoever, particularly in view of the fact that the petitioner had been living separately from his children since the year 1985, and despite the

fact that he became entitled to be a natural guardian in relation to his children as soon as they attained the age of five years. The petitioner admittedly had chosen to approach this Court after a long time and that too by asking for issuance of a writ of habeas corpus.

4. For the reason aforementioned, we are of the view that it is not a fit case in which a Rule Nisi should be issued.

This application is, accordingly dismissed.

5. Application dismissed.

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