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02-03-2022

Ct. 8

FMA 520 of 2021  
CAN 1 of 2020  
CAN 2 of 2020

Tushar Kanti Das  
Versus  
Kajal Saha

**(Through Video Conference)**

Mr. Debajyoti Datta, Adv.  
Mr. Amritan Mandal, Adv.  
Ms. Sohini Chakraborty, Adv.  
Mr. Shamit Sanyal, Adv.  
Ms. Ananya Chakraborty, Adv.  
Mr. Aditya Mondal, Adv.  
...for the appellant

Mr. Bikash Ranjan Bhattacharyya, Sr. Adv.  
Mr. Subhasis Chakraborty, Adv.  
Mr. Srijib Chakraborty, Adv.  
Ms. Sushmita Kumari Singh, Adv.  
Mr. Anit Chowdhury, Adv.  
...for the intervenor – Julie Roy

Mr. Anirban Ray, Ld. G.P.  
Mr. Raja Saha, Adv.  
Mr. Debasish Ghosh, Adv.  
...for the State

The learned Government Pleader placed before us three reports in three separate sealed envelopes, which are:

- (i) Report from District Child Protection Officer, dated 23<sup>rd</sup> February, 2022;
- (ii) Report from Counselor, Juvenile Justice Board, Howrah, dated 23<sup>rd</sup> February, 2022, and;
- (iii) Report from the Child Welfare Committee, Howrah dated 23<sup>rd</sup> February, 2022;

We have perused the reports carefully. The District Child Protection Officer in his report has stated that clinical

Psychologist and Counsellor of Juvenile Justice Board, Howrah had interacted with the child on 9<sup>th</sup> February, 2022 and 22<sup>nd</sup> February, 2022 when it was noticed that the child was interacting gladly with her biological father and she was happy though the child was also concerned about Julie Roy, with whom she was living. In our previous order dated 2<sup>nd</sup> February, 2022, we have permitted CWC to exercise all or any of the powers under Section 37 of the Juvenile Justice (Care and Protection of Children) Act, 2015 read with Rule 18 of the West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2017, keeping in mind the welfare of the child.

Mr. Bikash Ranjan Bhattacharyya, the learned Senior Counsel appearing on behalf of Miss. Julie Roy has submitted that the exercise of jurisdiction by CWC under Section 37 of the Juvenile Justice Act read with the relevant Rules is not applicable in the instant case since the child was taken well care by her care giver. The decision of the CWC to remove the child from the custody of her care giver on 16th February, 2022 and to place the child under the custody of Superintendent, Nabajibon Home is contrary to law, illegal and without jurisdiction.

Mr. Bhattacharyya submitted that it was never the intention of this court to allow the CWC to separate the child from the care giver. In any event, the child is not in need of care and protection as defined under Section 2 (14) of the Juvenile Justice (Care and Protection of Child) Act, 2015. Appropriate direction may be passed to restore the child to the

care giver with the right of visitation by the biological father that was existing since 17th November, 2021.

Per contra, Mr. Debojyoti Dutta, the learned Counsel appearing on behalf of the appellant/father has submitted that unless the child is separated from Julie Roy and is allowed to freely interact with the father, the bonding between the father and the child would never take place. Moreover, the child was taken into custody illegally by the neighbour without any order from any court or any competent authority and the circumstances are such that unless the child is separated and/or removed from the custody of Julie Roy, there is no possibility of a healthy and emotional bonding with the father. Mr. Dutta supports the action taken by the CWC in this regard and submits that the child is being properly looked after by their specialised agency and the said arrangement should continue which will ensure benefit of the child.

In order to appreciate the contention of the parties with regard to the measure taken by CWC for separating the child from her alleged care giver Julie Roy in exercise of its power under Section 37 of the Juvenile Justice Act read with Rule 18 of the West Bengal Juvenile Justice (Care and Protection of Child) Rules 2017, it is necessary for us to look in retrospect, the circumstances under which we directed the CWC to intervene and take appropriate measure.

The appellant is the biological father of the minor girl. A custody battle was fought between the father and maternal grandmother. The trial court granted custody to grandmother.

This order is under challenge. During the pendency of the appeal the grandmother expired. The appellant/father immediately approached the co-ordinate bench with a prayer for custody of the child. The appellant contended before the co-ordinate bench that the minor is presently in the care of one Julie Roy, a neighbour and a next friend who had taken steps to seek custody of the minor and requested the bench to pass appropriate order in exercise of its power under Section 42 of the Guardians and Wards Act, 1890 in the best interest of the child. The appellant, however, alleged that Miss Roy is trying to sell the minor which was strongly refuted by the learned Counsel representing Miss. Julie Roy. The co-ordinate bench on 10th November, 2021 directed Julie Roy in whose temporary care the minor was kept to file an affidavit disclosing the circumstances in which the minor was put in her care and the steps taken by her with regard to minor's well being. The matter was adjourned till 17th November, 2021.

On the returnable date the parties were heard at length. Miss. Julie Roy contended that she is a care giver of the minor child Ally Das, a 4 ½ year old girl. She was born in the house of her mother on 6th August, 2016. Her mother committed suicide on 7th March, 2018. The appellant/father was arrested in connection with the criminal case registered over the suicide. However, he was granted bail. Subsequently he filed an application seeking custody of the minor, who at the material point of time, was in the custody of her maternal grandmother Kajol Saha. By the impugned judgment the trial court upon

considering the facts and circumstances of the case directed the minor to remain in the custody of the said Kajol Saha till she attained 15 years of age and was in a position to make conscious decision with regard to her own custody. During the pendency of the appeal the said Kajol Saha also committed suicide. It was under such circumstances Julie Roy had taken custody of the child. Miss. Julie Roy in the affidavit averred that due to the absence of any responsible member in the immediate family of the deceased Kajol Saha, Julie Roy, a family friend and distant relation, took over care and custody of the child and she had developed a deep connection with the child since her birth. The child is comfortable in her care and custody. She also filed an application for the guardianship of the minor being Misc. Case no. 145 of 2021 before the learned District Judge, Howrah. The appellant before the co-ordinate bench contended that the custody of the child be handed over to him as he is the biological father, Julie is nowhere related to the child and the father is best suited to take care of the child under these circumstances.

On consideration of the submission made on behalf of the parties the co-ordinate bench, inter alia, passed the following order:

*“No doubt, the appellant is the father of the minor Ally Das. However, since the child, who is presently 4½ years of age, was brought up at the residence of her matrimonial grandmother and after her death in the custody of Julie Roy, a close family friend and neighbour of the grandmother. It is contended on her behalf that she had day to day association with the growth and development of the child. Hence, it may be inferred that the child is accustomed to her company. A co-ordinate bench had earlier directed visitation right to the appellant between 11.00 a.m. to 2.00 p.m. on every alternate Saturday at the chamber of the learned advocate-on-record of*

*the deceased grandmother. However, due to certain disputes, such visitation order was withdrawn. Situation has substantially changed as the grandmother who was in the custody of the child, no longer alive.*

*It is strongly contended that the child is well adjusted with the intervenor Julie Roy and immediate transfer of her custody to the father would be traumatic for the child. However, it must also be borne in mind that a bond between the child and her natural father ought to be encouraged from tender age. Such bonding is not an assertion of right of the father but a step towards wholesome development of a minor vis-a-vis her natural parents.*

*In order to enable such a situation and ensure a balance development of the minor, we direct that the minor be handed over to the appellant at 9.00 a.m. on two consecutive Saturdays, i.e. 20th November, 2021 and 27th November, 2021 respectively from the residence of Julie Roy and the appellant shall hand back the minor to the said Julie Roy at her residence at 9.00 p.m. on those dates. The handing over and taking back of the child as aforesaid, shall be in the presence of the learned advocates-on-record of the appellant as well as the intervenor Julie Roy. It is expected that the parties shall act in terms of this order and the best interest of the child.”*

Thereafter, this matter was taken up by this bench on 29th November, 2021. Initially we directed Miss Julie Roy to produce the child at 2 p.m. on that date, however, the child could not be produced as Miss Roy was in mourning due to death in her family. However, considering the tender age of the child we direct the child welfare officer to interact with the child and in absence of the parties at his office or at any other suitable place and file a report on the adjourned date in a sealed envelope. We however, did not disturb the arrangement that was being followed since 17th November, 2021 and did not disturb the custody of the child. However, we made slight modification to the visitation rights of the father. On 6th December, 2021 we found that the child welfare officer did not carry out our direction and we observed that in the facts and circumstances of the case the child needed proper care and a fit

person should be appointed to have proper custody of the child. Unless the appropriate authority to decide the custody of the child no one can claim any right over the child and take custody of the child. Moreover, the appellant/father being natural guardian has a better right vis a vis Miss Julie Roy. Keeping that in mind we directed production of the child before CWC by Julie Roy on 6th December, 2021.

Since we were carrying on the impression that the child was influenced by Julie Roy and she would never allow the child to interact freely with her father and develop a bond between the father and a child, we took recourse to the provisions of JJB Act and Rules for the welfare of the child. On 6th December, 2021 we found the child to be extremely traumatized and she was not inclined to interact with us at all. The reason for the production of the child before us was to enable us to form an opinion if the four and half year old child is capable of forming an intelligent preference regarding her custody. As we have noticed the circumstances was not favourable to have a pleasant interrogation with the child because of the tremendous influence Ms. Julie Roy had exerted on the child and the situation was not at all conducive for an interrogation.

This compelled us to direct the CWC, DCPO and clinical psychologist to intervene and to find out the mental state of the child and whether it was possible that the child may be returned to her natural guardian, namely, the father. It was for that purpose, we have permitted the CWC to exercise such

power as CWC was well-conversant to deal with such matters, having the benefit of persons well-acquainted with the subject. The report of the Counselor, Juvenile Justice Board is very pertinent in this regard. We quote the relevant portion of the said report:

*“I have visited Ally Das and her father and observed their interactions. Ally seemed to be happy with her father if she had the reassurance that she will simultaneously not be separated from the lady. She had difficulty in staying with her father when she felt separated from the lady. Here Jully Roy is the only person who can support the child emotionally to accept and adapt new situations. But she only showed her emotional pain to the child and called child “Amar Meye, Amar Meye”. She seemed to be more inclined to antagonize the child against her biological father. It would have been very congenial if she had actively and selflessly participated in helping the child conformably adjust with her biological father by simultaneously giving her emotional support as needed.*

*Keeping the best interests of the child at heart, a child friendly environment along with psychological intervention as required will help Ally to accept new and realistic solutions. An environment for short stay may be created in the interim period so that she can accept new situations and adapt to it gradually. Here child should be informed properly where she is going child should the visit the place periodically by support of elders before starting to stay there. All the process should be conducted in very very caring way and child should be informed about her short term staying in child friendly way and her state of mind will be assessed.*

*I again visited the child on 22.02.2022 at Nabajiban Home near Chingrihata. Before talking to her, I tried to collect information about her behavior in the home. Home authorities stated that when she came there, she at first refused food, started to vomit and also had mild temperature at night. Then she changed herself totally. She tried to talk about Julie Roy, but it was not reciprocated and then she stopped taking her name. She repeatedly said she wanted to go to her father. Everyday she made video calls and requested her father to visit her. She eagerly tried to communicate with him several times.*

*Then I started to talk to Ally. I brought a red colour hair band for her. She seems to be happy after getting it. She started to talk to me comfortably. She showed me her drawings where she had drawn her father and family members and also had drawn a house. She had also drawn herself and her father together on a paper. It seemed she was trying to cope with the environment of Nabajiban Hime and adjust with the staff there. She addressed a few children there as her brothers and sisters.*



*She called her father in front of me and talked to him. She was taking information about other family members like uncle and grandparents over video call. In my opinion the staffs are working there seemed to be taking good care of her and appeared to be very sincere and eager to give her full emotional support in this situation. When I touched Ally it seemed that her body was very stiff. Gradually it became normal. Probably it was manifestation of her emotional state. Though she was repeatedly saying that she wanted to go and stay with her father. But it seemed that for releasing herself from home she eagerly tried to go with her father. She felt staying with father is better option than staying at home. When I asked about July Roy. She managed her tears and stated that she will go to her father. Though when I used some projective techniques it revealed that actually she wants to stay with July Roy.*

*In conclusion, it may be said that the best interests of the child should be our guiding principle in this situation. The lady for all her professed love for the child seemed more concerned about her own emotional demands. She seemed to be more inclining to antagonize the child against her biological father. It would have been very congenial if she had actively and selflessly participated in helping the child comfortably adjust with her biological father by simultaneously giving her emotional support as needed. The father seemed well intentioned to get back his child and give her a healthy life but of course it needs periodic follow-up. It has also to be noted here that the child is more vulnerable in the light of the fact that there is a strong family history of affective illness in the maternal side (Suicide in mother and grandmother). Children with such family history are known to be more emotionally fragile and vulnerable in later life. So this situation has to be handled very delicately with professional help from psychologists and even psychiatrists if needed so that the child ultimately develops into a confident human being and a useful member of society.*

*A child does not fully understand who biological father is or who is biological mother. Child only understands his or her need satisfaction and emotional comfort and gratification. This has been borne out by numerous scientific studies and has led to many revolutionary ideas about animal and human behaviour like Attachment theory of Bowlby. But in the long term, in the interests of healthy psychological development it is best that the child is allowed to know the truth and cope with it healthily. This will also be in consonance with the shining principle of our Constitution, i.e. Satyameva Jayate, truth always prevails. In this instant case it would have been very helpful if Ms. Julie Roy gave precedence to the best interests of the child. In some situations a child may have to be kept apart from her biological parent if the parent is deemed unfit for the child's upkeep. But here it does not appear to be the case. Considering the child's fragile emotional state here extensive psychological support to the extent of counseling even twice or*

*thrice a week needed to soften the child's initial pain of separation from her perceived mother figure. But ultimately the child may through therapy gain mental strength and resilience to healthily overcome this emotionally stressful situation. But all initiative should be taken on the basis of mental state of the child."*

On 5<sup>th</sup> January, 2022 CWC submitted its report. After going through the said report we directed CWC and DCPO to ensure production of the child before a child-psychologist, once or twice in a week as the child psychologist may decide and the said authorities must also ensure that all the conditions of Rule 19 of the JJ Model Rules 2016 are followed.

We also observed that all attempts should be made to develop a bond between the father and the child, as observed earlier by the co-ordinate Bench, vide its order dated 17th November, 2021.

We also directed the appellant father to appear before the Counselor or psychologist as the case may be, arranged by the CWC for better and proper appreciation of the issues concerning the guardianship of the minor child.

We empowered the CWC to isolate the child from the present custodian namely, Ms. Julie Roy, if the welfare of the child so demands. We directed CWC, DCPO and child-psychologist/Counselor to file their respective reports on the adjourned date. The matter was therefore taken up on 2<sup>nd</sup> February, 2022, when CWC, DCPO, psychologist and clinical psychologist and the Counselor, JJB Howrah filed their respective reports in sealed envelopes.

On consideration of the progress made by the CWC and

the clinical psychologist, we extended the existing arrangement for a further period of four weeks. However, we had empowered the CWC, if required, to exercise all or any of the powers under Section 37 of the Juvenile Justice Act, 2015 read with Rule 18 of the West Bengal Juvenile Justice Care and Protection of Children (Rules), 2017. These reports are now on record.

The Clinical Psychologist in her report dated 2nd March, 2022 noticed that presently, the child is out of a depression and very cheerful. The Clinical Psychologist did not find any psychopathology or psychotic feature in the child. The child was found to be playful and friendly with the other inmates, taking proper food and no sleep disturbance was reported.

The child was placed in a specialized adoption agency on 16th February, 2022 with the objective of facilitating a smooth transfer of custody to the biological father, Mr. Tushar Kanti Das. The said order was also communicated to Julie Roy on 17th February, 2022.

We are not unmindful of the fact that the appeal is arising out of a proceeding under the Guardians and Wards Act, 1886, and during the pendency of the appeal the grandmother of the child died and in terms of the said provision the Court would require to appoint a guardian.

The primary reason for which we empowered the CWC to exercise its power under Section 37 of the JJB Act was that we were of the view that Julie Roy was unfit for the custody of

the child. Her conduct does not make her fit to become a guardian of the child. She is neither financially capable of rearing of the child nor can provide the child with education. She has her own family along with grown up son. On the contrary, the biological father is an engineer and is financially sound. He also had an attachment towards his child, and over a period of time as the report would suggest a bonding has developed between the father and the child.

The measure that we have taken is not in conflict with Section 42 of the Guardians and Wards Act, 1886 the court is empowered to take such measure or measures that are necessary for the welfare of the child. The JJB Act 2015 is a recent statute and provides mechanism for rehabilitation and social integration of a child with the family. The Act provides for specialized agencies to function closely for the welfare and betterment of a child. Even if it is assumed for the sake of argument that the child may not be a child in need of care and protection in strict sense of the term under the provisions of JJ Act. We feel that nothing prevents the court from adopting such measure and/or measures with the help of the institutions and authorities established under the JJ Act for the social integration and family bonding of the child with her biological father.

We cannot be unmindful of the fact that the Juvenile Justice Care and Protection Act, 2015 is a consolidation and amendment of the laws relating to children, amongst others, who are in need of care and protection by catering to their basic

needs through proper care, protection, development, treatment, social reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established.

In a matter of the child custody the court is exercising *parens patriae* jurisdiction. The Court is required to give due weight to the ordinary comfort of the child, contentment, intellectual, moral and physical development, health, education and general maintenance, and the favourable surroundings. The Court is not bound either by statutes nor by strict rules of evidence nor procedure or precedent. In deciding the issue of custody, the paramount consideration should be the welfare and well-being of the child. [See: *Nil Ratan Kundu v Abhijit Kundu* reported in **2020 (12) SCC 248** at paragraph 17].

It is well settled that while deciding the matters of custody of a child the welfare of the child is primary and paramount. If the welfare of the child so demands, then technical objections cannot come in the way. The Courts are expected to decide the issue of custody on a paramount consideration which is in the best interest of the child.

Initially on 29<sup>th</sup> November 2021, we directed Ms. Julie Roy to produce the child, so as to enable us to form an opinion if the 4 ½ year old child is capable of forming an intelligent preference regarding her custody. Due to bereavement in her family the child was not produced. Subsequently, as stated hereinbefore, on 6<sup>th</sup> December, 2021 the child was produced

before us. However, we could not interact with her as she was traumatized and started screaming. She was tightly holding Julie Roy and we had no doubt in our mind that the child was tutored and the situation was not at all conducive for a healthy interaction with the child.

It is the duty of the Court to ensure that the child is required to be kept away from negative influences and stressful atmosphere. In a catena of decisions it has been held that in dealing with a matter concerning a minor, the court has a special responsibility and it is the duty of the court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the court has to be guided by the only consideration of the welfare of the minor. [See: *Sheoli Hati v Somnath Das*, reported in **2019 (7) SCC 490**].

The reports on record suggest that the father is in a better position. In *Gaurav Nagpal v Sumedha Nagpal*, reported in **2009(1) SCC 42** at paragraph 28, the Hon'ble Supreme Court has lucidly explained the word "welfare" in the following words:

*"50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case (2008) 7 SCC 673, the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.*

*51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense.*

*The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.”*

When the bonding between the father and the child is growing, we do not want to disturb the present position. At this stage, we also mention that in order to circumvent the present proceeding a writ petition was filed by Smt. Julie Roy against the Child Welfare Committee & Ors. being WPA 3567 of 2022 questioning the jurisdiction of CWC to send the child to the safe custody of the superintendent Nabojobon Home on 16th February, 2022. In fact the learned Counsel for Julie Roy orally mentioned this matter before us soon after 16th February, 2022 when we orally observed that Julie Roy may take out an appropriate application in this proceeding, venting her grievance. However, it seems that instead of filing such application in this proceeding, a separate writ petition was filed before a learned Single Judge and the learned Single Judge upon noticing that the issues in the said writ application are closely interlinked with FMA 520 of 2021, declined to pass any order.

In view of the fact that the child is progressing well as it appears from the reports of the CWC, DCPO and all other stakeholders, we direct the said authorities to continue with the present arrangement until further order and we shall review the progress after eight weeks when the CWC, DCPO, Child Psychologist, Clinical Psychologist and Counselor shall file

their reports in sealed envelopes.

The reports, filed today shall be resealed and to be kept in the safe custody of the court and to be produced on the adjourned date. The matter shall appear on 27<sup>th</sup> April 2022.

**(Ajoy Kumar Mukherjee, J.)**

**(Soumen Sen, J.)**