

Court No. - 81

Case :- HABEAS CORPUS WRIT PETITION No. - 576 of 2022

Petitioner :- Ansh Jaiswal (Minor) (Corpus) And Another

Respondent :- State Of U.P. And 6 Others

Counsel for Petitioner :- Manoj Kumar Gupta

Counsel for Respondent :- G.A., Dharmendra Kumar

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri P.K.Singh, Advocate holding brief of Sri M.K.Gupta, learned counsel for the petitioners, Sri M. S. Pipersenia, Advocate holding brief of Sri Dharmendra Kumar, learned counsel for respondent nos. 4 to 7 and learned A.G.A. for the State.

2. This habeas corpus writ petition has been filed by the petitioner no. 2- Vikas Jaiswal on behalf of his son petitioner no. 1-Ansh Jaiswal to issue a writ, order direction in nature of habeas corpus directing the respondent nos. 2 and 3 to produce him and set him free from illegal custody of respondent nos. 4 to 7 i.e., grandparents (maternal) of the corpus and other members of his family.

3. The facts relevant as emanating from petition, counter affidavit, rejoinder affidavit and supplementary affidavit are as below:-

The corpus was born to the petitioner no. 2 from his former wife-Shani Jaiswal on 19.07.2016; Shani Jaiswal died on 11.12.2018 because of some illness; at the time of death of his wife, the corpus was less than 1½ year old; the petitioner no. 2 went into mental trauma because of death of his wife; there was no one to take care of his minor son except his son's old grandmother; in these circumstances, Ansh Jaiswal was taken away by the respondents for taking better care; in a subsequent development, the petitioner no. 2 got remarried to another woman namely, Garima Jaiswal and now he is having a girl child from her, born on 01.04.2021. It is alleged in the petition that the petitioner no. 2 has been regularly visiting his in-laws house and was helping them financially for taking proper care of his son but after the birth of girl child in his family, the respondent nos. 4 to 7 have been creating hindrance in meeting his son. How they are not permitting him to meet his son and also declining to handover his son's custody to him.

4. The arguments of the petitioner are that the custody of the child was handed over to his maternal grandparents, as at that time he was less than 1½ year old and that his own mother i.e., the paternal grandmother of the child had grown too old; the circumstances were not conducive for him to keep the child with them, therefore, the child was given to the maternal grandparents only for the time being. He has been regularly visiting his child but since after his remarriage and birth of a girl child in his family, he has been denied of his legal rights; he being the real father of the child, is

entitled for custody. The custody of his child with the maternal grandparents is illegal, therefore, his application for habeas corpus deserves to be allowed.

5. The main contentions from the side of the respondents are that the relations between the husband and his late wife were not normal. The entire family of the petitioner no. 2 used to torture their daughter-Shani Jaiswal. Shani Jaiswal suffered from serious abdominal disease. The family members of petitioner no. 2 never took proper care of Shani and she died in December 2018. The corpus was staying with his maternal grandparents alongwith his mother since before her death. The petitioner no. 2 never tried even to know about his son's welfare. He has suddenly woken up after a lapse of 4 years. Presently, the petitioner no. 2 is happily married to another woman and is already having a baby girl and in such circumstances, the custody of his son should not be transferred to him for the reason that there is no chance of his being taken good care of at his father's place in a new atmosphere. It is further vehemently argued that the custody of the child with maternal grandparents cannot be branded as illegal and that the petitioner no. 2 is having a remedy to file an application under the provisions of the Guardians and Wards Act.

6. In *Nil Ratan Kundu vs. Abhijit Kundu*, 2008 (9) SCC 413, the Supreme Court of India considered the matter where a minor child was ordered to be handed over to the father on the ground that he was his natural guardian and that present and future of the minor was secure with his father; the custody was wrested from the son's maternal grandparents; the maternal grandparents approached the High Court by filing an appeal. The appeal was dismissed holding that the trial court was right in ordering the custody to be given to the father. The aforesaid order passed by the High Court was challenged by the maternal grandparents before the Supreme Court. The main contention of the appellants was that the approach of the trial court and the High Court was technical and legalistic rather than pragmatic and realistic; the wishes of the minor son were not considered by the trial court. (The High Court concerned had taken a view that the child had been tutored to make him hostile towards his father); the paramount consideration of the welfare of a child was not considered. The Supreme Court while addressing the issue regarding the custody of a child, considered the legal position and referred to certain principles. In para nos. 22, 23, 24 and 25 of the judgment passed in *Nil Ratan Kundu vs. Abhijit Kundu (supra)*, it was observed as below:-

"22. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

23. In Habeas Corpus, Vol. I, page 581, Bailey states;

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the

mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

24. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interest of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

25. In *Mc Grath, Re*, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed;

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded."

While referring to American Law, the Supreme Court reproduced para no. 148, pp. 280-81; of American Jurisprudence, Second Edition, Vol. 39; as below:-

"27. In para 148; pp.280-81; it is stated;

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or

mother, the Court may properly consult the child, if it has sufficient judgment".

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30. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child."

7. After observing the general principles of law, as applicable in the matters of custody/guardianship while exercising writ jurisdiction of habeas corpus, the Supreme Court went on to consider the legal position in India in the light of various statutes. The Supreme Court observed that such principles have been given legal recognition in various statutes and thereafter examined the scope of aforesaid principles in the light of the provisions of Guardians and Wards Act. Though the Apex Court in that case was considering the matter coming before it in civil appeal, challenging the custody which was granted under the provisions of Guardians and Wards Act, but the general principles regarding custody of a child in writ jurisdiction and the applicability of same principles while applying statutory law were discussed and compiled. It may be usefully noted that the Supreme Court reversed the findings given by the trial court as well as the High Court and handed over the custody to the maternal grandparents from father.

8. A Constitution Bench in the case of ***Kanu Sanyal vs. District Magistrate, Darjeeling, (1973) 2 SCC 674*** dealing with the nature and scope of a writ of Habeas Corpus observed as below:-

"It will be seen from this brief history of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detailed is directed in order that the circumstances of his detention may be inquired into, or to put it differently, in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint. The form of the writ employed is We command you that you have in the Kings Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf. The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), the essential and leading theory of the whole procedure is the immediate determination of the right to the applicants freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."

9. In *Tejaswini Gaud and Others vs. Shekhar Jagdish Prasad Tewari and Others*, 2019 0 Supreme(SC) 540 (Criminal Appeal No. 838 of 2019 decided on 06.05.2019), the Supreme Court has held in para no. 18 as below:-

“18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.”

10. The Allahabad High Court in *Reshu @ Nitya and 2 Others vs. State of U.P. and 3 Others* decided on 22nd October, 2021 in Habeas Corpus Writ Petition No. 9 of 2020, dealt with a matter in which the paternal grandparents sought custody of a minor child who was merely 19 months old at that point of time, from respondent no. 4, her maternal grandfather.

In the aforesaid case, the mother of the corpus went to her ‘maika’ for medical treatment. The minor child had accompanied her mother. The mother died because of cardiac arrest. After her death, the corpus remained in the custody of maternal grandfather. The issue before the court was that the father of the corpus being the only surviving parents and natural guardian was entitled for custody of the child and was to be preferred over the respondent no. 4. It may be noted that the argument of the petitioners was that section 6 of the Hindu Minority and Guardianship Act entitled him to take over the custody of his child from child’s maternal grandfather. It was an admitted fact that the minor child was about 3 years old at the time of the decision in the case and that he/she was under care and custody of maternal grandfather ever-since she was an infant. The High Court referred to the judgment given in *Smt. Anjali Kapoor vs. Rajiv Baijal*, where the custody of minor child was being claimed by the father on the ground of his being natural parents, from the maternal grand-mother. The court found that the child had developed an emotional bonding with her grandparents, therefore, the corpus was allowed to be retained by his/her grand parents. Para no. 17 of the aforesaid judgment is as below:-

“17. In the case of Smt. Anjali Kapoor Vs. Rajiv Baijal, where the custody of a minor child was being claimed by the father being natural parent from the maternal grand-mother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child and on facts, the child having been brought up by the grand-mother since her infancy and having developed emotional bonding, the custody of the child was allowed to be retained by the maternal grand-mother. While considering the competing rights of natural guardianships vis-a-vis welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to

the earlier decisions in Sumedha Nagpal Vs. State of Delhi¹⁶, Rosy Jacob Vs. Jacob A.Chakramakkal¹⁷, Elizabeth Dinshaw Vs. Arvand M. Dinshaw¹⁸, and Muthuswami Chettiar Vs. K.M.Chinna Muthuswami Moopanar¹⁹, it was also held that welfare of child prevails over legal rights of parties while deciding custody of minor child.”

The court in para no. 59 of the judgment held as below:-

“59. It would be relevant to bear in mind that in deciding questions relating to custody of a minor child, as in the present case, the paramount consideration would be welfare of the minor and not the competing rights with regard to guardianship agitated by the parties for which the proper remedy would be before the appropriate statutory forum.”

11. The petitioner has taken support from the judgment of the Supreme Court in ***Tejaswini Gaud and Others vs. Shekhar Jagdish Prasad Tewari and Others (supra)*** and the judgment of Allahabad High Court given in ***Master Advait Sharma vs. State of U.P. and 5 Others, 2021 0 Supreme(All) 216***. It may be noted that the Supreme Court in ***Tejaswini Gaud and Others vs. Shekhar Jagdish Prasad Tewari and Others (supra)*** observed in para no. 13 as below:-

“13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.”

In the same case in para no. 19, the Supreme Court has given an opinion that in child custody matter, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act. It was further observed that there are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature where the rights are determined only on the basis of affidavits.

12. In ***Master Advait Sharma vs. State of U.P. and 5 Others (supra)***, the dispute related to custody of a child to two parents. The mother had applied for custody of her minor son, who was in the hands of his father and his grandparents. The custody was ultimately made over to the mother in the above case. The minor son had attained the age of 5 years and the provisions of section 6(a) of the Hindu Minority and Guardianships Act were considered which said that the minor, who has not completed the age of 5 years, shall ordinarily be with the mother. This provisions by implication said that if the age of the minor was above 5 years, the father had a right to take him in his guardianship. The court in para no. 43 observed that the statutes are no panacea to answer complicated issues like the welfare of a minor child but they do serve as a guiding principles around which the perplexing question of child’s welfare has to be determined.

13. The present case is no less complicated if the legal rights of the parties are focused at. In the present case, by accidental turn of events, the custody of the corpus remained with his maternal grandparents. This is not disputed that mother of the corpus died when he was less than 1½ year old and that since then i.e., since his infancy he is under the care of his maternal grandparents. The child is undisputedly almost 5½ years old now. All this while, he was not in continuous contact of his father. The father, has meanwhile, remarried. This marriage was solemnized in April 2021 i.e., within a little over 2 years of death of his wife. It is quite difficult to determine a disputed question of fact in this writ as to what were the actual circumstances in which the custody of the minor boy came into or remained with the maternal grandparents since last several years and where lies ultimately welfare of the child or his best interest whether in the custody of his father and new mother or in the custody of the maternal grandparents. In my view competent civil court is better equipped to decide on those questions in an appropriate proceeding. I add consciously that the observations just made with reference to disputed questions of facts is not to say that the second wife of the petitioner no. 2 cannot take good care of step-son but the fact remains that the child is well acquainted with his maternal grandparents since last several years as compared to his real father and step-mother. Though I feel a bit hesitant in using the word 'step-mother' but for want of any good alternative this word is being used. In case the custody of child is transferred to his father all of sudden the child shall be compelled to stay with a new person who is a stranger to him. The position remains touchy, sensitive and tricky.

14. A question can be raised as to why the child was not interviewed with regard to his inclination, in the nature of the facts and circumstances before this court. I find it actually unnecessary to interview the corpus to enquire about whether he wants to go with his father or with his maternal grandparents. It goes without saying that having been in the custody of his maternal grandparents since quite long, a young and impressionable mind is most likely to say that he wants to stay with his maternal grandparents. The realities of Indian society is like grandparents more often than not shower unconditional love and care for their grand-children. Any interview taken at this stage may not only unsettle or disturb the child but may cause prejudice to a party and may influence a court which may have to, in future decide the case regarding the custody of the child under the Hindu Minority and Guardianship Act, if the father initiated such a proceeding.

15. The question regarding legality/illegality of custody of a child, cannot be left unaddressed. The petitioner has himself, in his petition said that he had consented for his son being taken away from his house, for taking proper care because there was none other to take good care of an infant at that time. Whether such consent was for the time being only is not very material to decide the controversy here. In view of the above, the detention cannot be held out rightly illegal. Moreover my opinion is, as was observed in number of cases by the Supreme Court and the High Court that this court in exercise power of writ jurisdiction has not to go into nuances

of the facts, the circumstances under which the custody fell in the hands of maternal grandparents or go strictly by the legal rights of the parties. This court may take decision as regard custody focussing more on welfare of the child and less on pure legal rights.

16. My view is that, without entangling the matter into legality or otherwise of the custody, this petition should be disposed of with best interest of the child in mind in present scenario. Current circumstances of the present case demand that the child, who is merely 5 or 6 years old, is not disturbed from his present environment, affinity, compassion, love of the people with whom he is presently living with. Any step by this court, at this stage, disturbing his custody may not contribute to his mental health. The matter does not end here. The rights of a father cannot be just brushed aside. The father has his own legal, moral as well as social rights. A balance is to be struck between the interest of the corpus and the rights of his father, therefore, I find it appropriate to give him visiting rights till the matter of custody is decided finally by a competent forum under the statutory law. It may again usefully be noted that before the civil court/family court the parties have better scope of putting all the facts and relevant circumstances in right perspective. The court shall have an opportunity to see the matter as a whole in a wider framework of law and facts. This is reiterated that remedy in law is not foreclosed for the father.

17. On the basis of above discussion, it is directed that the petitioner no. 2 (the father) shall have right to visit his son in the house of the respondents two times a month on Sundays. He shall have additional opportunity to visit his son on his birthday and on festivals like, Dusshehra, Diwali, Holi and Rakshabandhan. The respondents shall not put in any obstacle on the visitation rights of the father. The visitation rights shall continue till the question of custody is decided by the civil court/family court under the statutory law.

18. This habeas corpus writ petition is **disposed of** accordingly.

Order Date :- 06.11.2023.

#Vikram/-