

Neutral Citation No. - 2023:AHC-LKO:83698

RESERVED ON 11.12.2023

DELIVERED ON 19.12.2023

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 179 of 2023

Petitioner :- Ms. X (Detenue) Thru. Her Father Mr. Y. And Another

Respondent :- State Of U.P. Thru. Prin. Secy. Home, Lko. And 4 Others

Counsel for Petitioner :- Umang Agarwal

Counsel for Respondent :- G.A.,Abhishek Shukla,Manoj Kumar Tiwari,Rajeiu Kumar Tripathi,Sumit Kumar Srivastava

Hon'ble Karunesh Singh Pawar,J.

1. Heard learned counsel for the petitioner and learned counsel for respondent no.4 as well as learned A.G.A. for respondent nos. 1 to 3.

2. The present Habeas Corpus petition has been filed with the following main prayer:-

"Issue a writ, order or direction in the nature of Habeas Corpus directing the opposite parties to produce the minor before the Court, and upon production of the minor, hand over the custody of the detenue to the petitioner no.2.

3. Petitioner no.1 is the detenue and petitioner no.2 is the father of petitioner no.1. It is alleged by the petitioner that minor detenue has been enticed away by the accused Dileep Yadav from our parental home and consequently F.I.R. No.0082 of 2022 was lodged by petitioner no.2 under Section 363 Indian Penal Code, Police Station Kotwali Dehat, District Bahraich against Dileep Yadav, who is the son of respondent no.4

Mangre. It is further alleged that the detainee was forced to marry accused Dileep Yadav after being kidnapped and was subjected to sexual assault by Dileep Yadav. The custody of the detainee has been granted to the respondent no.4, father of the Dileep Yadav accused by the police in violation of provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 and The Protection of Children from Sexual Offences Act, 2012.

4. Per contra, learned counsel for the private respondent no.4 have opposed the petition and submitted that the detainee on her own accord and free will went away with Dileep Yadav and has married him and therefore, it is not a case of illegal detention.

5. Learned counsel for the private respondent no.4 further submits that the radiological age of the detainee has been found to be 19 years. The petition has been filed on the sole ground of minority of the detainee on the basis of transfer certificate of Class-8 in which her date of birth has been mentioned as 18.8.2006, which could not have been done as it does not mandate under Clause (i) of Section 94 (2) of the Juvenile Justice Act. To support his contention he has relied on the judgement of **P. Yuvaprakash vs. State Rep. by Inspector of Police** reported in **AIR 2023 SC 3525** and submits that Hon'ble Supreme Court in this case had observed that school transfer certificate and extracts of the admission register cannot be relied on to determine age of the victim in POCSO cases.

6. Perused the record.

7. It appears that F.I.R. No.0082 of 2022 was lodged by the complainant Umesh Kumar Verma under Section 363 Cr.P.C. against the accused Dileep Yadav and for quashing of the said F.I.R. the accused Dileep Yadav as well as the detainee have approached this Court by filing Criminal Misc. Writ Petition

No.1380 of 2022, Deeksha Verma and another vs. State of U.P. and others and it was submitted before that Court that the petitioners are major and have married each other of their own volition on 12.03.2022 as per Hindu Rites and Rituals at Arya Samaj Mandir, Sector-H, (Harsh Vihar Purniya), Aliganj, Lucknow. A copy of Aadhar Card was filed in that petition and it was submitted that she is major and marriage certificate dated 12.03.2022 was also on record. It was contended that respondent 4, who happens to be the father of petitioner no. 1, is not happy with the marriage and as such he is creating hindrance in the peaceful married life of the Petitioners. The Court vide order dated 16.3.2022 directed the Investigating Officer to get the Petitioner no. 1 medically examined. It was further directed to ensure that the statement of Petitioner no. 1 is recorded under Section 164 Cr.P.C.

8. Pursuant to the order passed by the Court vide order dated 16.3.2022, the statement of the detinue under Section 161 Cr.P.C. as well as statement under Section 164 Cr.P.C. were recorded in which she has denied the prosecution story and has submitted that she on her free will went away with the Dileep Yadav. In purported compliance of the court's order, the detinue was medically examined in which the doctor has opined that there is no sign of use of force and no sign of sexual assault.

9. The allegation is of having mislead the Court by filing forged and fabricated copy of the Aadhar card and also incorrectly stating that the girl is illiterate, whereas she studied till class 8th and her educational testimonials were filed along with the Counter Affidavit, according to which her date of birth is 18.8.2006 have been made in the Writ Petition No. No.1380 of 2022 and that finds mentioned in the order of the Court dated 8.7.2022.

10. Again on 21.7.2022, learned A.G.A. has informed the Court that on medical examination the girl was found to be 19

years of age and in her statement under Section 164 Cr.P.C. the detenue has not supported the prosecution story and that the girl is residing with her in-laws. These facts find mentioned in the order of Court dated 21.7.2022 passed in Writ Petition No. No.1380 of 2022. Ultimately, the writ petition was disposed of.

11. The date of birth recorded in the school record appears to be highly disputed. However, as per the statement given by learned A.G.A. in Writ Petition No. No.1380 of 2022 the detenue appears to be major and about 19 years old. Even otherwise, as per the school record also she is more than 16 years of age. The First Information Report in the matter has already been lodged. Investigation appears to be going on. The private respondent has not filed any Counter Affidavit. Learned A.G.A. has submitted that in compliance of the order passed by the Division Bench the detenue has been given in the custody of her father-in-law Mangre. As per the Affidavit filed by the State the effort is being made for recovery of the detenue.

12. Though the educational record as well as Aadhar Card are disputed between the parties but as per the ossification test and the statement of learned A.G.A. in Writ Petition No. No.1380 of 2022, the detenue is 19 years old.

13. As per the statement under Section 164 Cr.P.C. of the detenue, which has been recorded in compliance of the order passed by the Division Bench of this Court in Writ Petition No. No.1380 of 2022, she on her own accord and free will went away with the Dileep Yadav and married him. It is evident that she is major as per the medical and she has married the accused Dileep Yadav and wants to live with him. It cannot be said to be a case of illegal detention.

14. In the case of **Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (2019)7 SCC 42** Hon'ble Supreme Court has held that *where the court is of the*

view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. What is important is the welfare of the child. Relevant paragraphs 18 and 19 from the judgment (Tejaswini Gaud) are extracted 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.

*19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. **Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court.** It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."*

15. Since, the investigation is going on it will not be proper for the Court to give any finding in the matter as it may impact the investigation. The extraordinary jurisdiction of this Court under Habeas Corpus cannot be exercised in a matter in which the investigation is going on and the thorough enquiry is required which is already being done by the State police.

16. In view of the above, the writ of Habeas Corpus fails and is accordingly dismissed.

Order Date:-19.12.2023

Madhu