

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 298 of 2023

Petitioner :- Baby Muskan Sharma Thru.
Father Pradeep Kumar

Respondent :- State Of U.P. Thru. Secy. Home
Deptt. U.P. Govt. Lucknow And 4 Others

Counsel for Petitioner :- Mohd.
Salman,Mukhtar Ahamad

Counsel for Respondent :- G.A.,Anoop Kumar
Singh

Hon'ble Karunesh Singh Pawar,J.

1. Rejoinder Affidavit filed by learned counsel for the petitioner is taken on record.

2. Heard learned counsel for the petitioner, learned A.G.A. for respondent nos.1,2 and 3 and Shri Anoop Kumar Singh, learned counsel for respondent nos.4 and 5.

3. The present petition has been filed by the detinue Baby Muskan Sharma through her father and natural guardian Praeep Kumar alleging that the detinue has been illegally detained by respondent nos. 4 and 5, who are maternal grand parents of the detinue, therefore, the petitioner through this petition has prayed for the following main relief:-

1. Issue a writ, order or direction in the nature

of Habeas Corpus directing the opposite party no.4 to 5 to produce the petitioner/detenu before this Hon'ble Court and set her at her liberty forth with and he may be given in custody of the deponent i.e. father and natural guardian."

4. Submission of learned counsel for the petitioner is that the marriage of the petitioner with the daughter of respondent nos. 4 and 5 took place on 13.7.2013 and out of the wedlock the detenu was born on 18.4.2017. Owing to the illness wife of the deponent Rajni Devi passed away and after death of her mother the detenu is staying with her grand parents. With the consent of respondent nos. 4 and 5 the second marriage has been performed by the deponent on 22.10.2022.

5. Learned counsel for the petitioner further submits that the petitioner has given Rs.50,000/- to the respondent no.4. Respondent no.4, instead of depositing the said amount in the detenu account, has deposited the said amount in her bank account.

6. Learned counsel for the petitioner next

submitted that the deponent is the father of the detenue and step mother of the detenue is living with him and they are capable of taking care of the detenue.

7. Per contra, learned counsel for respondent nos. 4 and 5 has disputed the contention made by the petitioner. He submits that the mother of the detenue died due to hanging on 5.9.2022 and not due to illness. To support his contention he has invited attention of the Court towards *panchnama* dated 5.10.2010 (Annexure-CA-1).

8. Learned counsel for respondent nos. 4 and 5 has further disputed the submission of learned counsel for the petitioner that Rs.50,000/- given by the father of the detenue has been usurped by respondent no.4. He submits that the amount of Rs.50,000/- has been deposited in the name of Muskan Sharma on 13.12.2020 as Fixed deposit (Kisan Vikas Patra). A copy of the same is on record as Annexure CA-2.

9. The date of marriage of the daughter of the respondent no.4 and 5 has also been disputed by learned counsel for respondent nos.4 and 5. It has been further stated in paragraph 5 of the

counter affidavit that the marriage was solemnized in the year 2006 and mother of the detainee died on 5.9.2022 and since her death the detainee is residing with *nana* and *nani* (respondent nos.4 and 5).

10. He has further submitted that Muskan Sharma, the detainee is studying in class Ist at Shyam Singh Shyam Devi Public Inter College Kakrahi, District Sitapur.

11. The averments made in paragraph 12 of the writ petition have also been disputed by learned counsel for respondent nos.4 and 5. It has been stated that the deponent on 13.12.2022 had entered into an agreement to pay the maintenance to Muskan Sharma every month. The copy of the agreement dated 13.12.2022 is also on record as Annexure CA-3 to the Counter Affidavit.

12. He further submits that Muskan Sharma, the detainee is living happily with her maternal grand parents and they are taking all care and caution for her requirements and her future is secured.

13. Perused the record. There appears to be

some disputed question of facts in the writ petition, which require proper inquiry.

14. Hon'ble Supreme Court in *Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (2019) 7 SCC 42* 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 judgement (*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. Perusal of the record shows that cause of death of the mother of the detinue is disputed by respondent nos.4 and 5 and their contention is supported by copy of the *panchnama*, which causes aspersion on the character of the deponent.

16. Secondly, the date of marriage as well as the allegation of usurping Rs.50,000/- has also been disputed. Perusal of the agreement dated 13.12.2022 shows that the deponent has undertaken to pay the maintenance amount to

Muskan every month which, according to learned counsel for the deponent, he is regularly paying the maintenance amount. Although the same has not been disputed in the Counter Affidavit, however, learned counsel appearing for respondent nos. 4 and 5 submits that the maintenance amount was being paid prior to the filing of the writ petition, however, after filing of the writ petition the maintenance amount has been stopped.

17. Considering the above, it will be appropriate that parties should approach competent civil court having jurisdiction over the matter as thorough and detailed inquiry appears to be required. Thus, looking to the peculiar facts of this case, I am of the view that this case is not one of the exceptional cases wherein the rights of the parties regarding custody of the minor is to be determined while exercising extraordinary jurisdiction. Accordingly a writ in the nature of Habeas Corpus fails and is accordingly **dismissed**.

18. It is open for the petitioner to approach the competent authority for seeking custody of the

minor detainee.

19. No order as to costs.

Order Date :- 6.12.2023

Madhu