

Neutral Citation No. - 2023:AHC-LKO:81696

Reserved on 8.12.2023

Delivered on 13.12.2023

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 307 of 2023

Petitioner :- Netra Maurya Thru. Father Hariom Prakash And Another

Respondent :- State Of U.P. Thru. Prin. Secy. Home, Lucknow And 5 Others

Counsel for Petitioner :- Shraddha Tripathi, Pawan Kumar Upadhyay, Ram Ji Trivedi

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar, J.

1. Heard Ms. Shraddha Tripathi, learned counsel for the petitioner as well as learned A.G.A. for respondent nos. 1 to 3.
2. None appears for the respondent no. 4 to 6.
3. This petition has been filed by the detainee Netra Maurya, aged about 8 years through her father Mr. Hariom Prakash alleging that the mother of the detainee respondent no.6 Pratima Talukdar has abandoned the detainee and left her with respondent nos. 4 and 5, who are her foster parents.
4. It is contended on behalf of the petitioner that the deponent Hariom Prakash and respondent no.6 Pratima

Talukdar have obtained the decree of divorce under Section 13-B of Hindu Marriage Act vide order dated 27.11.2020 passed by the Additional Principal Judge, Family Court No.10, Lucknow in Case No.137 of 2020.

5. It is further submitted that while granting decree of divorce it is provided that custody of the child i.e. the detenue shall remain with the respondent no.6.

6. Learned counsel for the petitioner further submitted that since respondent no.6 is presently residing in Argentina and has flouted the decree of the Family Court and left the detenue with respondent nos. 4 and 5, who are not natural guardian and they have no right to detain the detenue, therefore the custody of the detenue is illegal and hence writ of Habeas Corpus should be issued.

7. On the contrary, learned A.G.A. has submitted that since custody of the detenue was given to the mother vide order of the family court and even if the mother is flouting the order of the family court while leaving the custody of the detenue with some other person who are not the natural guardian she can move an application

for modification in the order/decreed passed by the family court and petition for Habeas Corpus will not lie.

8. Learned A.G.A. has relied upon the Full Bench judgment of *Km. Rachna and another vs. State of U.P. and others* reported in AIR 2021 All 109 (HABEAS CORPUS WRIT PETITION No.362 of 2020).

9. In rebuttal learned counsel for the petitioner submits that objection raised by learned A.G.A. is misconceived. In the case of *Km. Rachna (supra)* the question was whether writ of Habeas Corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee. Whereas in this case the petitioner is not aggrieved by any order passed under Guardians and Wards Act by which custody was given to the mother of detainee rather grievance is that the custody so given by the court below to the mother of the detainee by the decree of the court below the mother has flouted such direction of the family court and herself has gone to Argentina and given the custody to respondent nos. 4 and 5.

10. This court vide order dated 27.10.2023 has summoned respondent nos. 4 and 5, who have appeared before the court and they have stated that they are not having the custody of the detinue. In fact custody of the detinue is with the mother, who has got her admitted in Girls Hostel of Mussoorie International School and she time and again visits her and bearing out all the expanses. They have further submitted that they are not the foster parents and respondent no.6 is their real child and the pleadings to the contrary in the petition is false and misleading.

11. Time was granted to learned counsel for the respondents to file Counter Affidavit but no Counter Affidavit has been filed neither any appearance has been put by respondent nos. 4,5 and 6.

12. Perused the record.

13. Perusal of the record shows that this is the third petition filed by the deponent on behalf of the detinue. The first petition i.e. Writ Petition No.394 of 2022 filed by the petitioner for the same relief was dismissed by the court. It was observed by the court that under Guardians and Wards Act regular proceedings are

already going on before the family court Lucknow for the custody of the corpus and therefore the rights of the parties with regard to custody of the child may be determined by the Family Court Lucknow and the petition was dismissed. Thereafter another Habeas Corpus Petition No.30 of 2023 was filed by the same petitioner for the same relief, however, the same was dismissed as withdrawn on 31.1.2023.

14. This court further noticed that the proceedings under Guardians and Wards Act are already pending before the Principal Judge, Family Court, Lucknow which is evident by Annexure-3. The petitioner while filing this petition has not disclosed anywhere in the pleadings that such proceedings are pending or the stage of the proceedings coupled with the fact that respondent nos. 4 and 5 have appeared before this court and have denied the very fact that they have the custody of the detinue.

15. No one is represented by respondent no.6.

16. This petition contains disputed question of facts which require thorough enquiry, which in the opinion of

this Court, can only be done only through regular proceedings, which are pending before the family court.

17. 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."

18. Hon'ble Supreme court in the case of Jose Antonio Zalba Diez Del Corral alias Jose Antonio Zalba vs. State of West Bengal and others reported in 2021 SCC OnLine SC 3434 has held as under:-

"In the present case, the admitted facts being that the mother has the custody of two minor children, for which the petitioner(father) has already filed a petition under Section 12 of the Act, which is pending consideration; and the custody of the children with the mother, who is a natural guardian, cannot be said to be illegal and, thus, the petition for habeas corpus would not be maintainable and that too directly under Article 32 of the Constitution of India. While saying so, we are not going into the question whether the maintenance amount directed by the Trial Court in the proceedings under the Protection of Women from Domestic Violence Act, 2005 has been paid or not. The statutory remedy available under the Guardians and Wards Act is the appropriate remedy, which has already been availed by the petitioner. There are no extraordinary or exceptional circumstances in the present case requiring this Court to exercise its jurisdiction under Article 32 of the Constitution of India. The remedy already availed by the petitioner is an appropriate and effective remedy, where all the questions raised herein regarding the welfare and well being of the children can be considered in accordance with law, after appreciation of the evidence, which may be led by the parties."

(emphasis is on paragraph 13)

19. In view of the aforesaid law laid down by Hon'ble Supreme Court and the fact that already proceedings under Guardian and Wards Act are pending between the parties, I am not inclined to entertain the writ petition. Accordingly, writ petition is **dismissed**. However, all pleas are left open to be taken by the parties before the regular proceedings. This Court has not expressed any opinion on the merits of the case.

Order Date :- 13.12.2023

Madhu