

Court No. - 21

Case :- HABEAS CORPUS WRIT PETITION No. - 325 of 2023

Petitioner :- Atindra Kumar Mishra (Minor) Thru. His Father Praveen Kumar Mishra

Respondent :- State Of U.P. Thru. Prin. Secy. Home, Deptt. Lko. And 2 Others

Counsel for Petitioner :- Pawan Kumar Mishra

Counsel for Respondent :- G.A.

Hon'ble Neeraj Tiwari,J.

1. Heard learned counsel for the petitioner and Sri Vivek Gupta, learned A.G.A. for the State.

2. Present Petition has been filed with the following prayer:

"a. Issue a writ, order or direction in the nature of Habeas Corpus directing the Opposite Party No. 2 to produce the detenue from the custody of the Opposite Party No. 3 and further to hand over the custody of the custody of the Detenue/Child to the deponent/natural guardian/ his next friend Praveen Kumar Mishra(Father) in the interest of justice.

b. Issue a writ, order or direction in the nature of mandamus commanding the Opposite parties to secure and facilitate a proper right of visitation for the deponent to meet his Child/Detenue i.e. Atindra Kumar Mishra(Minor), in the inerest of justice."

3. Learned counsel for the petitioner submitted that now the age of the child is 9 years and under the provision of Section 6A of the Hindu Minority and Guardianship Act,1956(hereinafter, referred to as, 'Act, 1956') petitioner is entitled for the custody of the child. In support of his contention, learned counsel for the petitioner placed reliance upon the judgment of Apex Court in the matter of ***Tejaswini Gaud And Others Vs. Shekhar Jagdish Prasad Tewari And Others: (2019) 7 SCC 42.***

4. Learned A.G.A. vehemently opposed the submission of learned counsel for the petitioner and submitted that Section 6A of the Act, 1956 only provides that up to the age of 5 years, mother would be the only guardian and after 5 years of age, father would also be entitled for guardianship. He next submitted that so far as judgment relied upon by the learned counsel for the petitioner is concerned, the same is not favoring the petitioner as it only says that writ of habeas corpus may be issued only in the case of illegal detention, therefore, present petition is liable to be set aside.

5. I have considered the submissions made by learned counsel for the parties and perused the record.

6. From the perusal of Section 6A of the Act, 1956, it is absolutely clear that it does not confer any right on the father for the guardianship only on the basis of completion of 5 years of age of the child. The aforesaid Section is quoted hereinbelow:

"6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

7. I have also perused the judgment of Apex Court in the matter of **Tejaswini Gaud(Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:

"19. 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."

8. From the perusal of the aforesaid judgment, it is absolutely clear that writ of habeas corpus may be issued in case of detention of minor child by the parent or others without the authority of law. So far as present case is concerned, it is admitted by the learned counsel for the petitioner that there is no dispute between the husband and wife and only wife decided to live separately alongwith with her son, therefore, it cannot be said to be an illegal detention.

9. In view of facts and circumstances of the case, present petition is **dismissed**.

10. No order as to costs.

Order Date :- 17.10.2023
ADY