

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 372 of 2023

Petitioner :- Miss Miraya Srivastava Thru. Her Natural Guardian And Next Friend Seemant Srivastava

Respondent :- Commissioner Of Police Gautam Buddha Nagar (Noida) U.P. And 5 Others

Counsel for Petitioner :- Vibhanshu Srivastava

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar,J.

1. Heard Shri Prashant Chandra, learned Senior Advocate assisted by Shri Vibhanshu Srivastava, as well as Ms. Radhika Singh, learned counsel for the petitioner and learned A.G.A. for respondent nos.1,2 and 6.

2. This petition has been filed by the detinue Ms. Miraya Srivastava, aged about 9 years through her next friend Seemant Srivastava with the following main prayer:-

"a) issue a writ of habeas corpus or a writ, order or direction in the nature of habeas corpus, directing the Respondents to produce the Petitioner in person in this Hon'ble Court to be set at liberty forthwith and be freed from the custody of the Respondent No.3 to 5;"

3. Learned counsel for the petitioner submits that the petitioner was born at Michigan, USA from the wedlock between her father Seemant Srivastava and mother Ms.

Akanksha, respondent no.3. The detainee is US citizen and is having US Passport. She was brought to India by her parents in the year 2019. It is submitted that the petitioner was forcibly removed from the custody of her father and natural guardian, who is also the next friend of the petitioner against her wishes on 13.3.2020 while she was residing at her parental house at B1/33, Sector J, Aliganj at Lucknow. He submits that the parents of the petitioner are presently residing in India.

4. Learned A.G.A. for the respondent State, on the other hand, has raised preliminary objection regarding maintainability of the Habeas Corpus petition and has submitted that already proceedings under THE GUARDIANS AND WARDS ACT, 1890 have been instituted by the father for the custody of the detainee before the Family Court, Gautam Budh Nagar in which an order dated 24.9.2021 in Case No.34 of 2020 was passed granting visitation right to the father of the petitioner by allowing him to visit the petitioner and also to speak to her every week over video-calls. On 16.9.2022 the case was dismissed for non-prosecution.

5. He further submits that once the petitioner has already

availed the remedy under THE GUARDIANS AND WARDS ACT, 1890 and an order was passed in his favour, the writ of Habeas Corpus is not maintainable. He further submits that even after the dismissal of the petition on 16.9.2022, the petitioner very casually without explaining the laches have filed this petition.

6. Rebutting the objections raised by learned A.G.A., learned counsel for the petitioner has submitted that visitation rights granted to the father vide order dated 24.9.2021 by the Family Court have not been complied with by respondent no.3. The petitioner's father was prevented by brute force by own brother of respondent no.3, thus, he submits that in view of these facts although an order was passed in his favour the benefit of the same could not be availed by the petitioner for the aforesaid reason and therefore, this petition.

7. In support of his contention learned counsel for the petitioner has relied on the following judgements of Hon'ble Supreme Court:-

- i). Rajeswari Chandrasekar Ganesh vs. State of Tamilnadu(2022) SCC OnLine SC 885,
- ii). Tejaswini gaud and others vs. Shekhar Jagdish Prasad (2019) 7 SCC 42

- iii). Nithya Anand Raghavan vs. State (NCT of Delhi and another)
- iv). ABC vs. State (NCT of Delhi) (2015) 10 SCC 1
- v). M. Sudakar vs. V. Manoharan and others (2011) 1 SCC 484
- vi). Ruchi Majoo vs. Sanjeev Majoo (2011) 6 SCC 479
- vii). Ashish Ranjan vs Anupma Tandon & Anr, (2010) 14 SCC 274
- viii). Gaurav Nagpal vs Sumedha Nagpal (2009) 1 SCC 42
- ix). Nil Ratan Kundu & Anr vs Abhijit Kundu (2008) 9 SCC 413
- x). Mausami Moitra Ganguli vs Jayant Ganguli (2008) 7 SCC 673
- xi). Union of India & Others vs Tarsem Singh (2008) 8 SCC 648
- xii). Ganpatbhai Mahijibhai Solanki vs State of Gujarat & Others (2008) 12 SCC 353
- xiii). Sheila B. Das vs P.R. Sugasree (2006) 3 SCC 62
- xiv). Rajesh K Gupta vs Ram Gopal Agarwal & Others (2005) 5 SCC 359
- xv). Mrs Elizabeth Dinshaw vs Arvand M. Dinshaw and Another (1987) 1 SCC 42
- xvi). Rosy Jacob vs Jacob A. Chakramakkal (1973) 1 SCC 840
- xvii). Yashita Sahu vs. State of Rajasthan and others (2020) 3 SCC 67

8. Perused the material available on record as well as the case laws cited by learned counsel for the petitioner.

9. So far as judgments in the case of **Rajeswari Chandrasekar Ganesh** (supra) is concerned, in that case it was held by Hon'ble Supreme Court that for exercise of the extraordinary jurisdiction for issuance of a writ of Habeas Corpus will depend upon the jurisdictional fact where the corpus establishes prima facie case that detention is unlawful and only when the aforesaid jurisdictional fact is established the applicant becomes entitled to the writ as of right. In that case the court was dealing with the case where the mother had allegedly violated the Ohio, USA court's order. In the present case the detenu is minor girl and is residing with her mother. It cannot be said to be unlawful detention by any stretch of imagination.

10. In **Tejaswini Gaud** (supra) 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. In the present case the minor is residing with her biological mother and natural guardian.

11. In the case of **Nithya Anand Raghavan** (supra) the child was removed from foreign country (UK) by mother in violation of interim/interlocutory order of foreign (UK)

court despite the fact that the custody with the mother will be presumed to be lawful.

12. In the case of **ABC vs. State (NCT of Delhi)** (supra), the court was dealing with an appeal arising out of the proceedings instituted under THE GUARDIANS AND WARDS ACT, 1890 it is not about the writ of Habeas Corpus or its maintainability.

13. In the case of **Rajesh K Gupta** (supra) Hon'ble Supreme Court upheld the order passed by the High Court allowing the mother to retain the custody of the daughter even on a petition filed by the practising Advocate and with the allegation that wife is suffering from serious mental disorder.

14. In the case of **Yashita Sahu** (supra) Hon'ble Supreme Court was dealing with the matter where the wife brought the minor to India in violation of the orders of the jurisdictional court in USA.

15. The facts of this case are quite peculiar and distinct from the cases relied upon by learned counsel for the petitioner (M. Sudakar (supra), Ruchi Majoo (supra), Ashish Ranjan (supra), Gaurav Nagpal (supra), Nil Ratan Kundu (supra), Mausami Moitra Ganguli (supra), Union of

India vs Tarsem Singh (supra), Ganpatbhai Mahijibai Solanki (supra), Sheila B. Das (supra), Mrs. Elizabeth Dinshaw (supra) and Rosay Jacob (supra)).

16. In this case the petitioner has already approached the jurisdiction of the competent court and instituted proceedings under THE GUARDIANS AND WARDS ACT, 1890. An interim order was also passed in favour of the petitioner, however the petition was dismissed for want of prosecution. No restoration application appears to have been filed by the petitioner before that court.

17. 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 extra ordinary 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 wellbeing 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)

18. In the present case several matrimonial cases between the parties are pending i.e. Case No.2172 of 2020 for Divorce under Section 13 HMA; Case No.509 of 2020 complaint under Domestic Violence Act by the petitioner's Grandmother and Case No.5206 of 2022 for quashing under Section 482 Cr.P.C. in which stay was granted and case is pending.

19. This court has also taken notice of the fact that the father of the detinue is already facing a charge under Section 498A, 323, 377, 504, 406 and 506 IPC in a case No.119/2020. In the case of **Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413**, it was observed that one of the matters which is required to be considered by a court of law

is 'character' of the proposed guardian and that the same would be a relevant factor. In an earlier decision in the case of **Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi**, (1992) 3 SCC 573, where in almost similar circumstances the father was facing a charge under Section 498A IPC, it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of the children to hand over their custody to the father.

20. Considering the above, I am not inclined to entertain this petition. However it shall be open for the petitioner to file an application for restoration before Family court at Gautam Budh Nagar. If such restoration application is filed within a period of fifteen days from today, the same shall be decided expeditiously within a further period of one month.

21. So far as the allegations made by the petitioner against the private respondents regarding threat extended to him at Gautam Budh Nagar is concerned, the petitioner may approach, in case such threat still persists, the Commissioner of Police Gautam Budh Nagar, who shall

look into the matter and after assessing threat perception to the petitioner and deponent provide adequate security to the deponent (father) to pursue his case.

22. It is made clear that this court has only adjudicated the maintainability of the Habeas Corpus petition and has not adjudicated the case on merit. All pleas are left open to be taken by the parties before the concerned court of law.

23. The petition is **disposed of**.

Order Date :- 23.11.2023

Madhu