

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 376 of 2023

Petitioner :- Redit Kumar Thru. His Father Manu Kesarwani

Respondent :- State Of U.P. Thru. Secy. Ministry Of Home Lko. And 2 Others

Counsel for Petitioner :- Shishir Pradhan

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar,J.

1. Heard learned counsel for the petitioner, learned A.G.A. for respondent State and Shri Shailesh Chandra Tiwary, Advocate, who has filed Vakalatnama on behalf of respondent no.3, which is taken on record.

2. The present petition has been filed by the detinue Redit Kumar, aged about 8 years and 2 months old through his father Manu Kesarwani alleging that the detinue has been illegally detained by respondent no.3, who is the mother of the detinue, therefore, the petitioner through this petition has prayed for the following reliefs:-

"i) to issue a writ, order or direction in the nature of HABEAS CORPUS directing the Opposite Party No.3 to produce the detinue/petitioner Master Redit Kumar as before this Hon'ble Court and he shall be set free at her own liberty and sweet will i.e. to his father who is his natural guardian.

(ii) to issue a writ, order or direction in the nature of HABEAS CORPUS directing the Opposite Party No.3 to produce the detinue/petitioner Master Redit Kumar

from his illegal detention as before this Hon'ble Court.

(iii) To pass such order to allow the detenue to meet with his father i.e. deponent at relatives house and neutral place on every Sunday and Public Holidays in Lucknow at relatives house and neutral place with police security being the O.P. no.03's is a hardened criminal, charge- sheeted in murder u/s 302 IPC.

And also direct the O.P. No.03 not to restrain the detenue to make phone-call, video-call and whatsapp call to contact with his father, natural guardian i.e. deponent for atleast 15 mins, thrice in a week and on special occasions like children's day, father's day, on birthdays of detenue and the deponent's birthday, on festive occasions like Holi, Deepawali, Janmashtami, Dussehera, New year, Christmas etc. and on other similar occasions. So that, the deponent and child i.e. detenue can express his feelings."

3. Learned counsel for respondent no.3 has raised preliminary objection and submits that divorce case has already been pending before the competent court at Allahabad under Section 13 of the Hindu Marriage Act. In the said proceedings an application under Section 26 of the Hindu Marriage Act has been filed by the petitioner. Learned Family court is seized with the matter. He submits that the petition is not maintainable in view of the judgement of Hon'ble Supreme Court in the case of **Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (2019)7 SCC 42**

5. Learned counsel for the petitioner does not dispute

the fact that an application under Section 26 of the Hindu Marriage Act has been filed by him, however, he submits that even visiting rights have not been provided to the petitioner, who is the father and natural guardian as per the THE GUARDIANS AND WARDS ACT, 1890.

6. Hon'ble Supreme Court in *Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others (2019)7 SCC 42* has held, in paragraphs 18 and 19, as under:-

"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."

7. It is not disputed between the parties that the detinue is residing with respondent no.3, who is mother of the detinue. The detinue is minor, therefore, by no stretch of imagination it can be said that custody of the detinue with the mother is illegal.

8. So far as welfare of the child is concerned, appropriate application under Section 26 Hindu Marriage Act has already been moved by the deponent of this petition.

9. Once it is evident that custody of the minor with his mother is not illegal a writ of Habeas Corpus before this court is not maintainable. So far as visiting rights of the deponent are concerned, learned family court where the matter is pending is directed to decide the application for visitation rights of the deponent, as regards the detinue, within a period of one month from the date of receipt of a certified copy of this order.

10. In view of the above, a writ in the nature of Habeas Corpus fails and is accordingly **dismissed**.

Order Date :- 6.12.2023/Madhu