

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 377 of 2023

Petitioner :- Smt. Kirti Srivastava Thru. Her Husband, Nitin Srivastava And Another

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

Counsel for Petitioner :- Vijay Bahadur Singh

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar,J.

1. Heard learned counsel for the petitioners as well as learned A.G.A. for the State-respondents.

2. In view of the proposed order being passed, notices to respondent No.4 is dispensed with.

3. The petitioners by way of filing this petition has prayed for the following relief:-

"(i) issue a writ, order or direction in the nature of writ of habeas corpus commanding and directing the respondents to produce the corpus (petitioner's) before this Hon'ble Court to set her/his liberty.

(ii) issue a writ, order or direction in the nature of writ of habeas corpus commanding to the respondents not to interfere in peaceful living of the petitioner no.1 and deponent as husband and wife."

4. This petition has been filed on behalf of the detainee No.1- Kirti Srivastava and detainee No.2-Namah through the husband of detainee No.1 Nitin Srivastava alleging that she is legally wedded wife of the deponent and has been illegally detained by respondent No.4.

5. Learned A.G.A., on the basis of instructions, has submitted that detainee No.1 Kirti Srivastava has denied the relationship with the deponent. On the contrary she has stated that on 22.11.2015 she was married with one Kartik Zeena and out of

the wedlock the detenue No.2 was born and she is presently residing along with her son i.e. detenue No.2-Namah with Kartik Zeena.

6. Learned A.G.A. along with written instructions has also provided the certificate regarding the educational proof of the detenue No.2 who according to the certificate is student of R.S. International, NOIDA. The application written by detenue No.1 Kirti Srivastava to the police are provided by the learned A.G.A. The same are taken on record.

7. I have perused the record.

8. From perusal of the record, it appears that contents of the writ petition are highly disputed.

9. The matter requires a thorough inquiry which is not possible for this Court while exercising the jurisdiction of habeas corpus. The Supreme Court in the case of **Tejaswini Gaud and others versus Shekhar Jagdish Prasad Tewari and others** reported in **[(2019) 7 SCC 42]** has held 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. 20. In the present case, the appellants are the sisters and brother of the mother Zalam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

10. Hence in view of the disputed questions of fact, this Court feels that thorough and proper inquiry is required to be conducted which can only be conducted by the competent civil court in appropriate proceedings and extraordinary jurisdiction of habeas corpus cannot be exercised in such matter as held by the Supreme Court in the case of Tejaswini Gaud (supra).

11. The writ of habeas corpus fails and is accordingly ***dismissed***.

12. However, it shall be open for the petitioners to take recourse under the common law regarding the custody of the detenue.

Order Date :- 7.12.2023

Saurabh Yadav/-