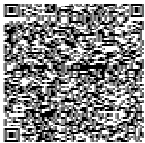


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IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRWP-7646-2024 (O&M)

Reserved on : 06.09.2024

Pronounced on: 10.09.2024

Neelu Talotra Petitioner

VERSUS

State of Punjab and others Respondents

CORAM: HON’BLE MS. JUSTICE KIRTI SINGH

Present: Mr. Vipin Mahajan, Advocate, for the petitioner.

Mr. R.S. Thind, DAG, Punjab.
Mr. Nikhil Ghai, Advocate, for respondent No.4.

KIRTI SINGH, J.

1. The jurisdiction of this Court has been invoked under Article 226 of the Constitution of India read with Section 528 of BNSS, 2023 by the petitioner-mother for issuance of a writ in the nature of Habeas Corpus for the release of detenue-Dhairya Saini (her son) aged 08 months from the illegal custody of respondent No.4-Rohit Saini (father).

Facts

2. Succinct factual narrative relevant for the disposal of the instant petition is that the petitioner was married to respondent No.4-Rohit Saini on 27.09.2022. The marriage between the petitioner and respondent No.4 was an elopement. At the time of marriage, Rohit Saini was divorced from his first wife. The petitioner along with her husband Rohit Saini had filed a petition bearing No.CRWP-9452-2022 seeking protection of life and liberty

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which was disposed of vide order dated 30.09.2022 with a direction to the Senior Superintendent of Police, Gurdaspur to look into the representation given by the petitioners.

2.1 From the wedlock one male child, namely, Dhairya Saini was born on 14.12.2023. Due to marital discord, the petitioner who was living with respondent No.4, was severely beaten and thrown out of the matrimonial house. She was not allowed to take her child along with her and respondent No.4 along with his parents forcibly retained the custody of the child. A copy of the MLR of the petitioner is attached as Annexure P2.

2.2 The petitioner along with her parents had approached the local police along with a copy of the MLR and had requested that the custody of the child be taken from respondent No.4 and handed over to the petitioner who was being nursed by the mother. However, no police assistance was provided to the petitioner.

Submissions made by learned counsel for the petitioner

3. It has been pleaded by learned counsel for the petitioner that the petitioner who is the mother of the child was mercilessly beaten by respondent No.4-Rohit Saini and thrown out of her matrimonial house without a consideration that the child was being nursed by his mother. The child is of a tender age of 08 months and needs love, affection, care and feed of his mother who is her natural and legal guardian. The petitioner is presently living in her parents' house and is capable to take care of the welfare of the child. It has further been argued that as per Section 6 of the Hindu Minority & Guardianship Act, 1956, the custody of a minor child,

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who has not completed the age of 05 years, shall ordinarily be with the mother. He has placed reliance upon an order dated 10.04.2017 passed by the Hon'ble Supreme Court in **SLP-2723-2017** titled as **Manpreet Singh and others Vs. State of Punjab and others**, an order dated 27.08.2024 passed by a Coordinate Bench of this Court in **CRWP-6377-2024** titled as **Anju Sharma Vs. State of Haryana and others**, and judgment dated 24.07.1986 passed by the Himachal Pradesh High Court in **Criminal Writ Petition No.16 of 1986** titled as **Kamla Devi Vs. State of Himachal Pradesh and others**, and judgment dated 07.03.2017 passed by a Coordinate Bench of this Court in **CRWP-68-2017** titled as **Kirandeep Kaur Vs. State of Punjab and others** in support of his contentions.

Submissions made by learned counsel for respondent No.4

4. On the other hand, Mr. Nikhil Ghai, Advocate appearing on behalf of respondent No.4 has argued that the petition filed by the petitioner is liable to be dismissed as it is not maintainable. Since, respondent No.4 is the father of the detinue and therefore, the detinue cannot be said to be in illegal custody of respondent No.4. Further, the relief sought by the petitioner cannot be granted in a Habeas Corpus petition as the alternative and effective remedy is already available with the petitioner which has not been availed. It has also been argued that the petitioner has not approached the Court with clean hands and she herself abandoned the child with respondent No.4 and left the matrimonial house. He further submits that the entire occurrence was recorded in the CCTV camera which clearly shows the petitioner leaving the house premises after abandoning the child with

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respondent No.4. He places reliance upon the judgment dated 06.05.2019 passed by the Hon'ble Supreme Court in **Criminal Appeal No.838 of 2019** titled as **Tejaswini Gaud and others Vs. Shekhar Jadish Prasad Tewari and others**, judgment dated 06.04.1981 titled as **Veena Kapoor Vs. Varinder Kumar Kapoor** in SLP-1073-1981, judgment dated 23.02.2011 passed by a Coordinate Bench of this Court in **CRWP-2403-2010** titled as **Sakina Vs. State of Punjab and others** and judgment dated 16.04.2024 passed by the High Court of Allahabad in **Habeas Corpus-WP-82-2024** titled as **Mithilesh Maurya and another Vs. State of U.P. and others.** He further submits that the petitioner can avail appropriate remedy by filing a petition under the Hindu Minority & Guardianship Act, 1956, for claiming the custody of the child.

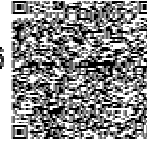
5. Learned State counsel has not disputed the fact that the custody of the child is currently with respondent No.4.

6. This Court vide order dated 02.09.2024 had referred the parties to the Mediation & Conciliation Centre of this Court to enable them to work out an amicable resolution of their dispute. However, report dated 03.09.2024 of the Mediator has been received, in which it is stated that after a lengthy joint and single sessions, the parties have not been able to work out any amicable settlement regarding custody of their son and the matter has been sent back to this Court.

7. Heard the rival submissions made by learned counsel for the parties and have perused the record.

Analysis

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8. For the proper consideration of the aforesaid contentions, it is appropriate to refer to the relevant decisions. The Hon'ble Supreme Court of India in **Yashita Sahu Vs. State of Rajashtan and others 2020 (3) SCC 67** has recognized that a writ of Habeas Corpus can be maintained for the custody of a child when the child is in custody of one parent, especially, if it is in the child's best interest. The Court can invoke the extraordinary jurisdiction in use to ensure the welfare of the child which is of paramount consideration in custody matter and to determine if the custody arrangement is in the child's best interest. The relevant extract of the said judgment is reproduced below:-

*“9. It is too late in the day to urge that a writ of Habeas Corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the Court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in **Elizabeth Dinshaw Vs. Arvand M. Dinshaw and others (1987) 1 SCC 42, Nithya Anand Raghavan Vs. State (NCT of Delhi) and another, (2017) 8SCC 454 and Lahari Sakhamuri Vs. Sobhan Kodali, (2019) 7 SCC 311** among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant-wife that the writ petition before the High Court of Rajasthan was not maintainable.*

*10. We need not refer to all decisions in this regard but it would be apposite to refer to the following observations from the judgment in **Nithya Anand Raghavan** (supra):-*

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46. *The High Court while dealing with the petition for issuance of a writ of Habeas Corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the Court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign Court must yield to the welfare of the child. Further, the remedy of writ of Habeas Corpus cannot be used for mere enforcement of the directions given by the foreign Court against a person within its jurisdiction and convert that jurisdiction into that of an executing Court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign Court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.*

47. *In a Habeas Corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition).*

11. *Further in the case of **Kanika Goel Vs. State of Delhi (2018) 9 SCC 578**, it was held as follows:*

34. *As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest*

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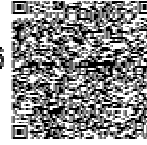
of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a Habeas Corpus petition. For the purpose of Habeas Corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful.”

9. Recently, a Coordinate Bench of this Court vide order dated 27.08.2024 passed in **CRWP-6377-2024** titled as **Anju Sharma Vs. State of Haryana and others** has observed as under:-

*“6. The law is well settled that a remedy of the writ petition in the nature of habeas corpus is available when the minor is illegally and improperly detained. In case **Tejaswini Gaud and others (supra)**, the Hon’ble Supreme Court, while deciding whether writ petition is maintainable or not, held that ordinarily remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. It is only in exceptional cases, the rights of parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus. The relevant extract from said judgment reads as under:-*

“13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the

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custody of a minor to his guardian when wrongfully deprived of it. 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. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

*14. In **Gohar Begum** where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In **Gohar Begum**, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar's mother's sister was allegedly detaining Gohar's infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-*

“7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no

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matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.

In Queen v. Clarke (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:

“But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty.” The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.”

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law.

.....

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right

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under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited.”

15. In **Veena Kapoor**, the issue of custody of child as between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

16. In **Rajiv Bhatia**, the habeas corpus petition was filed by Priyanka, mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husband's elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

17. In **Manju Malini** where the mother filed a habeas corpus petition seeking custody of her minor child Tanishka from her sister and brother-in-law who refused to hand over the child to the mother, the Karnataka High Court held as under:-

“24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner

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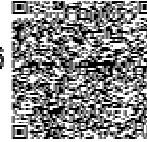


the natural and legal guardian, the continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent Nos.1 and 2 even amounts to the offence of kidnapping punishable under S.361 of IPC. Therefore there is no merit in the contention that the writ petition is not maintainable and respondent Nos.1 and 2 are in legal custody of baby Tanishka.”

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

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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.”

*6.1 In case **Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and others, Writ Petition (Criminal) No.402 of 2021, decided on 14.07.2022**, it is held that writ petition of habeas corpus is maintainable at the instance of one parent against the other and in child custody matters, the only relevant consideration is the welfare of the child.*

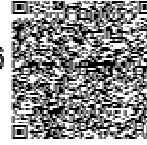
6.2 Section 6 (a) of Hindu Minority and Guardianship Act, 1956 reads as under:-

“6. Natural guardians of a Hindu minor.—

The natural guardian 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

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custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b)

(c) ”

The above said section provides that the custody of minor who has not completed the age of 5 years, shall ordinarily be with the mother. Thus, there is a presumption that welfare of a child of such tender age should be in the custody of mother but that presumption is rebuttable, which means the father has to disclose cogent reasons that the welfare of the child is jeopardized if the custody is retained by the mother.

*6.3 In case **Roxann Sharma (supra)**, it is held that if child is below 5 years, the father’s suitability to custody is not relevant since the mother is per se best suited to care for the infant during his tender age. It is for the father to plead and prove the mother’s unsuitability. Section 6(a) of the Hindu Minority and Guardianship Act preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old.”*

10. Coming to the case in hand, it is not in dispute that the parties i.e petitioner and respondent No.4-Rohit Saini were legally married on 27.09.2022 and from this wedlock one male child, namely, Dhairya Saini was born on 14.12.2023 who is currently residing with respondent No.4-father. A matrimonial dispute arose between both the parties in which the petitioner was allegedly beaten up and thrown out from the matrimonial house and the child was retained by respondent No.4. Both parties are currently residing in Gurdaspur.

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11. When the parents are in conflict, the child's well-being should remain the paramount concern. The Court must ensure that the child is not treated as an object to be passed back and forth but rather a person whose stability and security must carefully be protected.

A child, especially at a tender age, has a fundamental right to the love, care and protection of both parents. This is not only essential for the child's emotional and psychological development but is also recognized as a basic human right.

12. Given this dynamic, the Court must exercise caution in assessing the claims made by each parent free from any kind of bias and motive and must focus on the child's best interest. The goal of the Court should be to cut through the conflict and to assess a suitable environment where the child's overall well-being is safeguarded.

The primary and paramount consideration is always with the child's best interest which encompasses his/her physical and psychological well-being.

13. In custody battles the children often become the unintended victim of their parents' conflict. When the dispute becomes highly acrimonious, each parent may portray the other in negative light, sometimes marginally or by misrepresenting the facts to gain advantage. This adverse approach can create significant emotional and psychological concern of the child who is caught in the middle of the conflict. The main aim is to minimize disruption to the child's life and to ensure continuity with both

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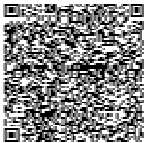
parents unless there are compelling reasons such as evidence of abuse or severe neglect to limit or deny the contact of one parent.

Conclusion

14. In view of the afore-mentioned discussion and keeping in mind the fact that the child is of a tender age of 08 months, this Court is of the considered opinion that till a decision is taken by the competent Court, the custody of the child shall remain with the petitioner-mother. Respondents No.2 and 3 are directed to ensure that the custody of the minor child is handed over by respondent No.4-Rohit Saini to the petitioner-mother-Neelu Talotra immediately in the presence of Chief Judicial Magistrate-cum-Secretary District Legal Services Authority, Gurdaspur, Punjab or any other officer deputed by the District & Sessions Judge, Gurdaspur for this purpose. Respondent No.4 shall produce the minor child at 11:00 a.m. on 12.09.2024 in the Alternative Dispute Redressal (ADR) Centre, Gurdaspur for compliance of this order.

15. Further, keeping in view the child's welfare and best interest which also includes ensuring that the child is not deprived of the affection and company of the father, this Court hereby directs that respondent No.4 will be provided access to the minor son by the petitioner at her parental home between 4:00 p.m. to 6:00 p.m. on 1st & 3rd Saturday of every month. Respondent No.4 will not, however, take the child out and will not by an act or omission on his part create any situation which has the direct or indirect effect of disturbing the sense of security and emotional balance of the child and the domestic harmony.

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This petition is allowed, accordingly.

(KIRTI SINGH)
JUDGE

10.09.2024
Ramandeep Singh

Whether speaking / reasoned	Yes
Whether Reportable	Yes