

Court No. - 12

Case :- HABEAS CORPUS WRIT PETITION No. - 255 of 2024

Petitioner :- Baby Shanvi Thru. Her Mother Nisha Kumari And Another

Respondent :- State Of U.P. Thru. Prin. Secy. Home Lko. And Another

Counsel for Petitioner :- Mukesh Kumar Tewari, Anjani Kumar Shukla

Counsel for Respondent :- G.A., Shyam Bahadur

Hon'ble Saurabh Lavania, J.

Supplementary affidavit filed on behalf of opposite party No. 2 in the Court today is taken on record.

Heard Sri Mukesh Kumar Tewari, learned counsel for the petitioner, learned AGA for the State of U.P., Sri Shyam Bahadur, learned counsel for the private opposite party No. 2 and perused the record.

The instant petition has been filed seeking following main relief:-

"(i) to issue, a writ, order or direction in the nature of Habeas Corpus directing the opposite party No.2 to produce the petitioner No. 1 (corpus) before this Hon'ble Court and give the custody of the petitioner No.1 (corpus) to the petitioner No.2 who is her biological mother, in the interest of justice."

Based upon the averments made in the instant petition, which are extracted hereunder, the counsel for the petitioners made his submissions.

"6. That the petitioner No.2 who is the mother of petitioner No.1 (corpus) is originally resident of Village G.4 F B WQZ Nehru Nagar Road, Nehru Nagar North, Sri Krishnapuri Patna (Bihar) and at present she is residing at Thakur Girls P.G College Near Amity International School Takwa Chauraha Viraj Khand -5 District Lucknow.

7. That father of petitioner No.2 is serving as Principal in the school of secondary education in Bihar and her brother is also in Government Service in the State of Bihar and both of them are living in State of Bihar.

8. That the petitioner No.2 got married with the opposite party No.2 on 19.2.2017 according to Hindu Rite and ritual in which their family members and relatives were participated in joined the marriage programs. It is further submitted that prior to the marriage the petitioner No.2 and opposite party No.2 were in love affair with each other and the family members of the both the persons were consented for their marriage consequently the marriage programs were arranged by the family members in accordance with Hindu rites and rituals.

9. That from wedlock of the petitioner No.2 and opposite party No.2 a female child was born on 12.10.2019 in the Astha Hospital LDA Colony Kanpur Road District Lucknow the name of the child is Shanvi Rai. The copy of the birth certificate issued by the Aastha Hospital is being annexed as Annexure No.1 to this petition.

10. That the date of birth of petitioner No.1 (corpus) is 12.10.2019 and according to which she is aged about 4 years 10 months, after her birth she was residing with petitioner No.2 and opposite party No.2 at matrimonial house at LDA Colony Kanpur Road District Lucknow till the first week of April 2024.

11. That it is further submitted that after few days of the birth of female child i.e. Petitioner No.1 the opposite party No.2 and his family started to cause cruelty with petitioner No.2 and opposite party No.2 had said that he will marry with a girl namely Nabanita with whom love affairs of opposite party No.2 is going on.

12. That the petitioner No.2 always manage the things for healthy atmosphere of the family but the behavior of opposite party no.2 always bad with the petitioner No.2 as he was continuously engaged in extra marital affair with his girlfriend.

13. That it is further submitted that the petitioner No.1 (corpus) was studying in Class-Monte-C at City Montessori School Kanpur Road Campus Lucknow and her examination were over in the April 2024. The copy of student I.D is being annexed as Annexure No.2 to this petition.

14 That the opposite party No.2 causing physical and mental cruelty with petitioner No.2 and he did not want to live with petitioner No.2 due to reasons mentioned above and consequently in first week of April 2024 he dropped the petitioner No. 1 & 2 at her Maika in Bihar by car, the car from which the petitioner No. 1&2 were dropped at Patna in Bihar is the own car of opposite party no. 2 and the movement of said car can be very well verified from the toll plazas in the way to Patna.

15. That since the first week of April 2024 the petitioner no.2 resided at her Maika in Bihar with her child Shanvi Rai and she was maintaining her child in good manner.

16. That it is relevant to mentioned here that due to extra marital/ love affairs of the opposite party no.2 with his girlfriend - Nabanita Dey he had quarreled with the petitioner No.2 and abuses her and did the high level drama and consequently the opposite party No.2 himself dropped the petitioner No.1& 2 at her Maika in Bihar.

17. That on 10.7.2024 the opposite party No.2 went to the petitioner No.2 were in the house of her brother in District-Patna Bihar the opposite party No.2 came meet with the petitioner No.1 and forcibly took the petitioner No. 1 to Lucknow and since then the petitioner No.1 has been illegally detained by the opposite party no. 2 at E- 156-157 Sector-G Kanpur Road, LDA Colony at Lucknow.

18. That opposite party No.2 having illicit relationship with his girlfriend-Nabanita who is belonging to Kolkata and residing in Delhi. The opposite party No.2 sometime resides with Nabanita in Delhi.

19. That the petitioner No.1 (corpus) is illegally detained by the opposite party No.2 at E-156, 157 Sector-G. Kanpur Road LDA Colony Lucknow which is within territory of this Hon'ble Court and the opposite party No.2 is not allowing to the petitioner No.2 to live with the petitioner no. 1 (corpus).

20. That the petitioner is well qualified and having the degree B.Pharm & M.B.A and she is capable to maintain her daughter (corpus) and she can give her quality education etc. and she is natural guardian of petitioner No.2 who is female child below 5 years.

21. That the petitioner No.2 is natural guardian of petitioner No.1 in term of Section 6 of Guardians and Words Act, therefore she is entitled for custody of petitioner No. 1.

22. That the petitioner no.2 has tried to meet her child below 5 years (corpus) but she has not been allowed to meet or enter in the house.

23. That when on 10.7.2024 the opposite party No.2 took child (corpus) from the custody of the petitioner No.2 then she and her father Ravindra Nath come to Lucknow by train on 10 July 2024 and stayed in a Hotel Royal Castle and tried to meet with the corpus but could not succeeded and there after on 11.7.2024 the petitioner No.2 has submitted an application before the officer in-charge of police station Mahila Thana Hazratganj Lucknow, officer incharge of thana Aashiyana and also moved the an application to the commissioner of police Lucknow stating therein all the things but no action has been taken. The copy of the Rail Reservation Ticket, Hotel Bill and application dated 11.7.2024 are being annexed as Annexure No.3 & 4 to this petition.

24. That the petitioner No.2 has also submitted an application through I.G.R.S Portal stating the same thing as stated in aforesaid application but nothing has been done by the authorities and authorities had decided the I.G.R.S complaint on the ground that a case No. 301/2024 Under the Guardians and Words Act, is pending before the Principal Judge Family Court Lucknow. The copy of the screen shot of the I.G.R.S Portal and report of police station Ashiyana Lucknow are collectively annexed as Annexure No.5 to this petition.

25. That it is further submitted that the opposite party no.2 is very clever minded person and in order to retain the custody of petitioner No.1 (corpus) he had filed the case under section 7 of Guardians and Words Act, before the Principal Judge Family Court Lucknow on 20.7.2024 on the basis of false and fabricated story after moving the application to police authorities by the petitioner No.2 on 11.7.2024 (contained as Annexure No. 4 to this petition) the date of moving application is 11.7.2024 and date filing of case under section Guardians and Words Act, is 20.7.2024. The copy of the plaint Under Section 7 of Guardians and Words Act dated 15.7.2024 filed on 20.7.2024 is being annexed as Annexure No. 6 to this petition.

26. That the opposite party No.2 already retained the illegal custody of child/corpus therefore the filing of case under section 7 of Guardians and Wards Act is nothing but same is abuse of process of law. The petitioner No.2 could acknowledge the filing of the aforesaid case only on 22.8.24 when the copy of the suit was sent by opposite party No.2 on whatsapp of petitioner No.2.

27. That in one hand the opposite party No.2 does not want to allow the petitioner No.2 to live with him in his house and in another hand he has filed a case under section 9 of Hindu Marriage Act before the Principal Judge Family Court Lucknow on 5.7.2024. The petitioner No.2 could acknowledge the aforesaid case when the opposite party No.2 gave information to petitioner No.2. The copy of the plaint under section 9 of Hindu Marriage Act dated 5.7.2024 filed on 5.7.2024 is being annexed as Annexure No. 7 to this petition.

28. That the petitioner No.2 is legal and natural guardian of petitioner No.1 who is the below 5 years all through the suit under section 7 Guardians and Wards Act has already been filed by opposite party No.2 which is not maintainable but mere filing of aforesaid case does not bar from invoking the writ jurisdiction before this Hon'ble Court because of fact that the custody of child is admitted.

29. That it is relevant to mentioned here that the petitioner No.2 is still want to live with opposite party No.2 and want to maintain the marital life but the opposite party No.2 has filed the case under section 9 of Hindu Marriage Act but does not want to live the petitioner No.2 because of fact that he having illicit relation with his girlfriend, therefore under these circumstances the custody of minor daughter below the age of 5 years (corpus) is not safe with opposite party No.2 the petitioner No. 2 with respect enclosing few photographs Nabanita Dey with opposite party No.2 showing the closeness of their relation. The photographs are being annexed as Annexure No. 8 to this petition.

30. That it is well settled law that the mother is entitle for custody of a minor female child below the age of 5 years and the petitioner No.2 wants the custody of the petitioner No.1 and if corpus is given to her then she will take care of her and took her to her parental house.

31. That the opposite party No.2 is doing private job in call center and want to marry with his girlfriend- Nabanita Dey therefore the custody of corpus is not safe with him because of fact that the welfare of child is not possible with him.

32. That the act of the private respondent is wholly illegal unjust and same is violative of fundamental of rights of the petitioner.

33. That the petitioner No.2 is advice to state that it is well settled position that the Hon'ble Court can invoke its extra ordinary writ jurisdiction of the interest of the child as has been held by the Hon'ble Apex Court in the case of Yashita Sahoo Versus State of Rajasthan & others in Criminal Appeal No. 127 of 2020."

Opposing the present petition, Sri Shyam Bahadur, learned counsel for the private opposite party No. 2 submitted as under:-

(i) Petitioner No. 2 is habitual of taking intoxicating substances such as beer, liquor etc. This statement is based upon the paragraph 15 of the counter affidavit and photographs annexed thereto as Annexure No. 1 i.e. at page Nos. 22 & 23 of the same.

(ii) The aforesaid has been denied in paragraph 27 of the rejoinder affidavit, as per which, the petitioner No. 2 had never taken alcohol rather the opposite party No. 2 is habitual of taking alcohol and also that the petitioner No. 2 was holding the bottle as she was asked to do so by the opposite party No. 2. Though, this is not correct. In fact, the petitioner No. 2 is habitual of taking beer, liquor etc.

(iii) The petitioner No. 2 is having no income and she is totally dependent upon her father and brother. She is not having sufficient means to cater the petitioner No. 1 (corpus). In this view of the matter, the welfare of child (corpus) would be affected.

(iv) The fact that the petitioner No. 2 is having no income is not denied in the rejoinder affidavit, as without there being any proof of income in paragraph 8 of the rejoinder affidavit, it has been stated that she is earning Rs. 20,000/- (Rs. Twenty Thousands Only) plus incentive per month as salary from Rashtriya Manav Adhikar Suraksha Parishad, Lucknow.

(v) The welfare of child should be the paramount consideration for providing

custody including in exercise of power under Article 226 of the Constitution of India. In the instant case, the petitioner No. 1/minor female child (corpus) is studying in 'Nursery' at City Montessori School, Kanpur Road Campus, Lucknow, which is one of the best schools in Lucknow and a perusal of receipt dated 12.12.2024 annexed at page No. 24 of the supplementary affidavit dated 12.12.2024 would show that an amount to the tune of Rs. 8,940/- has been deposited by the opposite party No. 2 towards fee.

(vi) The mother of the opposite party No. 2 is capable of taking care of the petitioner No. 1/minor female child (corpus) and she is doing so, as is apparent from the photographs annexed at page No. 18 of the counter affidavit.

(vii) The petitioner No. 1/minor female child (corpus) is happy with the opposite party No. 2, which could be visualized from the photographs annexed at page Nos. 12, 13, 14, 15, 16, 17, 19, 20 and 21 of the counter affidavit.

Considered the aforesaid and perused the record.

In order to decide the present petition, it would be apt to indicate the broad proposition of law on the subject matter of the present petition summarized by the Hon'ble Apex Court in the recent judgment dated 06.09.2024 passed in the case of **Somprabha Rana and others vs. State of M.P. and others** reported in **(2024) 9 SCC 382 : 2024 SCC OnLine SC 2415**. Relevant para of this report reads as under:-

"9. After having perused various decisions of this Court, the broad propositions of settled law on the point can be summarised as follows:

9.1. Writ of habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

9.2. The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;

9.3. Even if the High Court, in a petition of habeas corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the habeas corpus was sought, it will not be in the welfare and interests of the minor to disturb his/her custody; and

9.4. As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking habeas corpus concerning a minor."

Upon due consideration of the aforesaid, this court is not inclined to direct the opposite party No. 2 (father of petitioner No. 1) to provide the custody of petitioner No. 1 (a minor female child, born on 12.10.2019, aged about 5 years and 2 months) to petitioner No. 2 (mother). It is for the following reasons:-

(i) In the entire petition, the petitioner No. 2 has not stated the facts pertaining to her financial status.

(ii) To establish her earning i.e. Rs. 20,000/- (Rs. Twenty Thousands Only) plus incentive as salary per month from Rashtriya Manav Adhikar Suraksha Parishad, Lucknow, the petitioner No. 2 has not placed on record any documentary evidence.

(iii) The father and brother of petitioner No. 2 have not filed affidavit(s) before this Court indicating therein that they would take due care of petitioner No. 1 (corpus) and petitioner No. 2.

(iv) From a conjoint reading of paragraphs 14, 17 and 23 of the instant petition, it appears that the story setup by the petitioner No. 2 is concocted. It is for the reason that according to the same, the opposite party No. 2 forcibly took the custody of petitioner No. 1 at District- Patna, Bihar on 10.07.2024 and on the same day i.e. 10.07.2024, the petitioner No. 2 by train came to Lucknow and whereas train ticket (Annexure No. 3) indicates Departure time 6.15 AM on 11.07.2024. Paragraph 23 on the aforesaid is extracted hereunder:-

"23. That when on 10.7.2024 the opposite party No.2 took child (corpus) from the custody of the petitioner No.2 then she and her father Ravindra Nath come to Lucknow by train on 10 July 2024 and stayed in a Hotel Royal Castle and tried to meet with the corpus but could not succeeded and there after on 11.7.2024 the petitioner No.2 has submitted an application before the officer in-charge of police station Mahila Thana Hazratganj Lucknow, officer incharge of thana Aashiyana and also moved the an application to the commissioner of police Lucknow stating therein all the things but no action has been taken. The copy of the Rail Reservation Ticket, Hotel Bill and application dated 11.7.2024 are being annexed as Annexure No.3 & 4 to this petition."

(v) The corpus is with her father, who has deposited fee to the tune of Rs. 8,940/- on 12.12.2024, and grand mother and studying at City Montessori School, Lucknow, who got admission in the said school in the year 2023.

(vi) In view of aforesaid, this Court finds that it will not be in the welfare and interest of minor to disturb her custody.

For the aforesaid, this Court is not inclined to accede the prayer sought in the instant petition. It is accordingly **dismissed**. No order as to cost.

It is open for the petitioner No. 2 to get her rights adjudicated in the proceedings under the Guardian and Wards Act, 1890.

Order Date :- 13.12.2024

Arun/-