

Neutral Citation No - 2024:AHC-LKO:12365

Reserved on 02.02.2024

Delivered on 12.02.2024

Court No. - 16

Case :- HABEAS CORPUS WRIT PETITION No. - 364 of 2023

Petitioner :- Gauri Singh Thru. Mother Smt. Reeti Singh And Aother

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

Counsel for Petitioner :- Jagjeet Singh,Devendra

Counsel for Respondent :- G.A.,Akhilesh Pratap Singh,Nipun Singh

Hon'ble Shamim Ahmed,J.

1. Heard Sri Jagjeet Singh, assisted by Sri Devendra and Ms. Anju Srivastava, learned counsel for the petitioner, Sri Nipun Singh, assisted by Sri Akhilesh Pratap Singh, learned counsel for the opposite party no.2 and Sri Ashok Kumar Singh, learned A.G.A.-I for the State.

2. The petitioner- Smt. Reeti Singh has filed this Habeas Corpus petition seeking the following reliefs:

*“i) Issue a writ, order or direction in the nature of **Habeas Corpus** commanding the respondents to produce both the petitioners before this Hon’ble Court and after the satisfaction of this Hon’ble Court they be set as liberty to live with deponent without any interference from respondent No.2.*

*ii) Issue a writ, order or direction in the nature of **Mandamus** commanding the respondents to permit the deponent to meet the petitioners at least once a week preferably on Saturday or Monday during the pendency of this writ petition.*

iii) To issue any other suitable writ, order or direction in which this Hon’ble Court deems just, fit and proper in the facts and circumstances of the case, in favour of the Petitioner.

iv) Allow the writ petition.”

3. The co-ordinate Bench of this Court on 28.11.2023 had passed the following order:

“Heard learned counsel for the petitioner as well as learned AGA for the State.

This habeas corpus petition has been filed by the detenues through their mother alleging that they have been illegally detained by respondent no. 2 who is father of the detenues.

It is submitted on behalf of the petitioner that earlier also an habeas corpus petition was filed in the year 2010 by respondent no. 2 at Allahabad which was referred for mediation and later on was dismissed. As a result of mediation, the deponent started living with the detenues and their father. In the year 2023, the deponent has lodged an FIR bearing No. 462/2023, under Section 498A/323/504/506 IPC, P.S. Gazipur, District Lucknow against respondent no. 2 and his mother.

It has been further submitted that since 05.07.2023, the detenues are being kept in illegal custody of respondent no. 2 against their wishes.

Learned AGA has opposed the contention of learned counsel for the petitioner submitting that the detenues have not been illegally detained. The detenues are living with respondent no. 2 who is their father.

Considering the fact that the petition has been filed through the mother of the detenues and considering the over all interest and well being of the detenues, respondent no. 2 is directed to produce the detainee before this Court on the next date of listing.

List on 19.12.2023.”

4. Thereafter, on 19.12.2023, the co-ordinate Bench of this Court had passed the following order:

“Vakalatnama filed by Shri Akhilesh Pratap Singh as well as Sri Nipun Singh, on behalf of respondent no. 2 is taken on record.

A perusal of the order dated 28.11.2023 shows that respondent no. 2 was directed to produce the detainee before this Court today.

Learned counsel for respondent no. 2 submits that only yesterday he came to know regarding the order.

It is evident that respondent no. 2 was aware about the order passed by this Court and even though, neither the detainee has been produced nor any exemption application has been given on behalf of respondent no. 2. This is a clear disobedience of the order passed by the Court.

Accordingly, let bailable warrants be issued against respondent no. 2.

List on 19.01.2024.”

5. Thereafter, on 05.01.2024, the co-ordinate Bench of this Court had passed the following order:-

“Order on Application No.IA/2/2024

This is an application for recalling of order dated 19.12.2023 passed by this Court whereby bailable warrants have been issued against the opposite party No.2.

Heard learned counsel for the parties and perused the record.

Opposite party No.2-Amit Kumar Singh is present before this Court and has given the undertaking that he will produce the detenue before the appropriate court on 19.01.2024.

For reasons mentioned in the affidavit filed in support of the recall application as well as the undertaking given by opposite party No.2-Amit Kumar Singh, the application is allowed.

The order dated 19.12.2023 passed by this Court is recalled.”

6. Thereafter the case was listed before this Court as regular Bench and on 19.01.2024, this Court had passed the following order:-

“Heard Sri Jagjeet Singh, assisted by Sri Devendra and Ms. Anju Srivastava, learned counsel for the petitioner; Sri Nipun Singh, assisted by Sri Akhilesh Pratap Singh, learned counsel for the opposite party no.2 and Sri Ashok Kumar Singh, learned A.G.A.-I for the State.

In compliance of the order dated 19.12.2023 and 05.01.2024, the petitioner mother, namely, Smt. Reeti Singh and the opposite party no.2, namely, Amit Kumar Singh alongwith the minor children, namely, Gauri Singh and Aaroahi are present before this Court and they have been identified by their respective counsel.

After a long discussion, the parties submit that they may be given some further time to think over the matter regarding amicable settlement of the dispute.

Learned A.G.A.-I for the State has also made agreement with proposal given by the respective parties and their counsel and submits that some fruitful time may be given to the parties to think over the issue.

After considering the arguments advanced by learned counsel for the parties and after hearing the respective parties, namely, Smt. Reeti Singh and Sri Amit Kumar Singh, this Court feels that there are fair chances of amicable settlement between the parties as the dispute between husband and wife is very minor and there is only some ego problem. Therefore, this Court thinks that this situation can easily be solved if the parties are given some time to think over the matter.

Accordingly, the matter is being postponed for 02.02.2024 before this Court for further orders.

In the meantime, the petitioner mother, Smt. Reeti Singh is allowed to visit the minor children at Allahabad in the house of Sri Nipun Singh, learned counsel for the opposite party no.2. She is directed to inform Sri Nipun Singh one day prior to her visit. Sri Amit Kumar Singh, the opposite party no.2 will take the children to the house of Sri Nipun Singh and will not create any hindrance between the meeting of children and mother.

The petitioner mother, Smt. Reeti Singh may give any gift or food items, which are not injurious to health, to the minor children towards her love and affection.

On the next date of listing i.e. 02.02.2024, the petitioner, Reeti Singh as well as the opposite party no.2, Amit Kumar Singh alongwith the minor children, namely, Gauri Singh and Aarohi shall remain present before this Court in person."

7. The pleadings between the parties have already been exchanged and the counsel argued the case on merits at length.

8. Learned counsel for the petitioner submits that the petitioner-Smt. Reeti Singh is wife of respondent no.2 and they were married on 28.11.2004 at Lucknow according to Hindu Rites and Rituals. Thereafter, out of their wedlock, two daughters, namely, Gauri Singh and Aarohi were born.

9. Learned counsel for the petitioner further submits that the petitioner was subjected to cruelty by the respondent no.2 and his family in lieu of demand of dowry.

10. Learned counsel for the petitioner further submits that in the year 2010, when the petitioner was residing at her parental home to save her life from the respondent no.2 and his family, the respondent no.2 moved a false Habeas Corpus Writ Petition before the Hon'ble High Court of Judicature at Allahabad and thereafter mediation was held in the Hon'ble High Court of Judicature at Allahabad and the writ petition was dismissed by the Hon'ble Court. Thereafter, the petitioner returned to her in-laws house at Allahabad, however, the behaviour of the respondent no.2 and his family members was not changed.

11. Learned counsel for the petitioner further submits that even petitioner's children i.e. the detenuess were also subjected to cruelty by the respondent no.2. He further submits that the respondent no.2 is a very angry and short tempered person, who can even kill someone in anger and there is always a fear that respondent no.2 may cause harm to petitioner or her children.

12. Learned counsel for the petitioner further submits that in the year 2020, the petitioner's mother-in-law provoked the respondent no.2 to shift the petitioner to first floor of the house and the respondent no.2 shifted the petitioner alongwith her children to the first floor of the house.

13. Learned counsel for the petitioner further submits that on 05.07.2023, when the petitioner asked the respondent no.2 that she want to have dinner with the family at ground floor and she came down, the respondent no.2 threatened her with dire consequences and the petitioner, somehow saved her life and went to Mahila Thana, Prayagraj and made a written complaint and thereafter came to her parental home in Lucknow and since then she is residing at her parental home in Lucknow.

14. Learned counsel for the petitioner further submits that the petitioner had also made a complaint before the Mahila Thana, Hazratganj, Lucknow against the respondent no.2 and his family, which was sent to the Mediation Center, Family Court, Lucknow. He further submits that inspite of several notices and calls from the mediation center, the respondents never attended the said mediation, therefore, the mediation got failed.

15. Learned counsel for the petitioner further submits that after a lot of efforts, the petitioner had lodged a First Information Report on 05.11.2023 against the respondent no.2 and his mother bearing Case Crime No.0462/2023, under Sections 498-A, 323, 504, 506 I.P.C., Police Station Ghazipur, District Lucknow.

16. Learned counsel for the petitioner further submits that the respondent no.2 is not allowing the minor children to meet or talk on telephone, as such, the detenues are being kept under illegal detention of respondent no.2.

17. Learned counsel for the petitioner further prays for handing over the custody of said minor children to petitioner who is biological mother of minor children and the present habeas corpus petition may be allowed by this Hon'ble Court.

18. Per Contra, Sri Nipun Singh, learned counsel for the respondent No.2 submits that the petitioner- Smt. Reeti Singh is a most irresponsible lady who does not have any respect or love and care for any relation nor for her husband and for minor children.

19. Learned counsel for the respondent No.2 further submits that the respondent No.2 does not have any objection if the petitioner- Smt. Reeti Singh wishes to visit the children at Allahabad, provided the same does not hamper their studies. He further submits that the admission of both the children were done at the St. Mary's Convent Inter College, Allahabad with the consent of mother-Smt. Reeti Singh, which is one of the best school of Allahabad. Thus, it is not a case of any illegal detention even the children are living and studying with their father with the consent of her mother. He further submits that the elder child, namely, Gauri Singh is studying in Class 11 whereas the younger child, namely, Aarohi is studying in Class 4 and in the month of March, 2024, they are going to appear for their final term examination. He further submits that the petitioner-Smt. Reeti Singh from the date of her marriage was living with the respondent no.2 at his house and she was happy except some minor dispute which happens between husband and wife in most of the families, but it does not mean that after more than 18 ½ years of marriage, the respondent no.2 became cruel husband and father and started torturing the petitioner- Smt. Reeti Singh. He further submits that the

petitioner- Smt. Reeti Singh had also lodged an F.I.R. bearing Case Crime No.0462/2023, under Sections 498-A, 323, 504, 506 I.P.C. at Police Station Ghazipur, District Lucknow against the respondent no.2 and her widow mother, who is living with the respondent no.2, that shows she is under influence of her parents and on wrong legal advice, the criminal case has been lodged only with malafide intention to harass the respondent no.2 and her mother. He further submits that the respondent no.2 was taking full care of his wife and children and has no problem if the wife wants to live with the respondent no.2.

20. Sri Ashok Kumar Singh, learned A.G.A-I has also supported the argument advanced by learned counsel for the respondent No.2. He further submits that relief sought in this Habeas Corpus Writ Petition could not be granted by this Court as the mother of the minor children could not be able to point out any illegality or any infirmity regarding the custody with the father. Thus, the prayer made in this petition could not be granted by this Court and if the mother wants custody of the minor children, then the remedy lies before the appropriate forum under the Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 for claiming the custody of minor children in accordance with law.

21. After considering the arguments as advanced by learned counsel for the parties this Court finds that minor children should not be deprived of the love and affection of both the parents as deprivation results in a grave psychological impact upon the impressionable and innocent disposition of a children in their formative years and in this case the minor children are being deprived of the love and affection of their parents and the parents are not able to interact with their children meaningfully. Whenever a question arises before a court pertaining to the custody of the minor children, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the children will probably be advanced. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the children so that she will be equipped to face the problems of life as a mature adult.

22. In the present case it is not in dispute that the petitioner-Smt. Reeti Singh got married to respondent No.2-Amit Kumar Singh in the year 2004. Thereafter, out of their wedlock two children, namely, Gauri Singh and Aaroahi were born. After some time the relationship between the husband and wife started to turn absurd and regular dispute arose and the petitioner has lodged a first information report against the respondent no.2 and her mother bearing Case Crime No.0462/2023, under Sections 498-A, 323, 504, 506 I.P.C. at Police Station Ghazipur, District Lucknow. This type of situation gives a negative impact on the psychological behavior of the minor children and is also not in the welfare of the children. Further, this Court observed that the relation between the husband and wife since 2004 till July, 2023 were cordial except some minor dispute and the matter once in the year 2010 was referred to the Mediation and Conciliation Center of High Court of Judicature at Allahabad, but thereafter the relation settled and the parties were living together and the two daughters were studying in one of the best school of city Allahabad, namely, St. Mary's Convent Inter College and the elder daughter, namely, Gauri Singh is studying in Class XI whereas the younger daughter, namely, Aaroahi is studying in Class IV and they are going to appear for their final term examination in the month of March, 2024. Thus, this Court is not inclined to disturb the studies of both the children and even the respondent no.2 is looking after them sincerely and with full responsibilities and the children, who were present before this Court, did not complaint anything against their father and both desire to live together with their parents.

23. In the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another; 2017 8 SCC 454**, it was held by Hon'ble Apex Court that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in para 44 to 47 in the judgment are being reproduced herein below:

*"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in **Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674**, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.*

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in **Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247**, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In **Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42**, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of *parens patriae* jurisdiction, as the minor is within the jurisdiction of the Court relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

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). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

24. Similarly, in the case of **Dhanwanti Joshi Vs Madhav Unde; (1998) 1 SCC 112**, the Hon'ble Apex Court was pleased to observe in para 27, 29, 30 of the judgment as under:

"27.....However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question

arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.” (emphasis supplied) Again in paragraphs 29 and 30, the three-judge bench observed thus:-

“29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child’s welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full Nithya Anand Raghavan vs State Of Nct Of Delhi on 3 July, 2017 development of the child’s character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in Mckee v. McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw.”

25. Similarly, in the case of **Shradha Kannaugia (Minor) and Another ,Vs State of U.P. and 5 others** in Habeas Corpus No. 716 of 2020, a co-ordinate Bench of this Hon’ble court was pleased to observe as under:

“It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed.”

26. In the present case petitioner-Smt. Reeti Singh herself consented to get both the children to be admitted in a reputed school at Allahabad, where they

are studying in Class XI and IV. It is not in dispute that the admission of both the children was done at the aforesaid school with the consent of the mother Smt. Reeti Singh, thus, the case set up by the petitioner Reeti Singh that the minor children are under illegal detention of respondent No.2 have no force and there appears force in the argument of learned counsel for the respondent No.2 that the relief sought by the petitioner-mother, Smt. Reeti Singh cannot be granted by this Court as the children are not under illegal custody of the father and are studying at Allahabad with the consent of the mother Smt. Reeti Singh and for custody she may approach the correct forum in accordance with law.

27. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined by Hon'ble Apex Court in the case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**; Criminal Appeal No. 838 of 2019 order dated 06.05.2019 and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

28. The observations made in the judgment in this regard are as follows:-

"14. 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 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.

x x x

19. 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.

20. 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."

29. A co-ordinate Bench of this Court in the case of **Master Manan @ Arush Vs State of U.P & 8 others**, decided on 18.02.2021 was pleased to observe in para 16 and 17 as under :

"16. In the present case, it is undisputed that the child is with his father since 22.8.2019 under his care and custody. It is not the case of either party that the child was forcibly taken away by the father from the custody of the mother. The pleadings and the material on record indicates the existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed.

17. It has been pointed out that the date of birth of the child is 09.08.2013, and accordingly, the child being more than 5 years of age, the custody of the child with the father, in view of the provisions under Section 6 (a) of The Hindu Minority and Guardian ship Act, 1956, cannot be said to be prima facie illegal."

30. Another co-ordinate Bench of this Court in Habeas Corpus Writ Petition No. 467 of 2021; **Vahin Saxena (Minor Corpus) ans Another Vs State of U.P. and three** others decided on 27-08-2021 was pleased to observe in para 22 as under:

"22. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 1956 or the Guardians and Wards Act, 1890, as the case may be."

31. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of minor children, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful and illegal and whether the welfare of the children requires that the present custody should be changed and the children

should be handed over in the care and custody of somebody else other than in whose custody the children presently are.

32. It is well settled law by a catena of judgments that while deciding the matter of custody of children, primary and paramount consideration is welfare of the children so demands then technical objections cannot come in the way. However, while deciding the welfare of the children it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the children. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at way with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents.

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 wherein 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.

33. This Court is not going into various allegations and counter allegations made by both the spouses. I am clearly of the view that it is in the best interest of the children to have parental care of both the parents, if not joint then at least separate. I have no doubt that the children needs both parents and the children would be equally happy, if not happier, in the company of the mother as well, the children would perhaps be happier if they could have both their parents. Unfortunately, the parents are unable to resolve their differences and stay together. Be that as it may, the children have a right to access both parents, and get the love and affection of both parents. Whatever the differences arose between the spouses, the children cannot be denied company of both.

34. From perusal of the affidavit filed in support of the present writ, it is clear that the mother left her in-laws house and came back to her parental house, as such, she was well aware of the custody of detenues/children, who are with their father at Allahabad, therefore, it cannot be said that it is an illegal custody / detention.

35. It is noteworthy that the petitioner was married to the respondent no.2 on 28.11.2004 and she came back to her parental home on 05.07.2023 i.e. after 18 ½ years of her marriage, as such, it appears that both the parties were living peacefully, however, some differences occur between them which is normal between any couple. It is also noteworthy that the elder child, namely, Gauri Singh is a student of Class 11 whereas younger child, namely, Aaroahi is a student of Class 4 and they are studying in St. Mary's Convent Inter College, Allahabad and are going to appear in their final term examination, which will probably be held in the month of March, 2024, thus, this Court is of the view that both the children, namely, Gauri Singh and Aaroahi shall remain in custody with their father in the interest of Justice as the welfare, love, affection and company protection is in the custody of the father/ respondent no.2.

36. Since, the children are residing with their father at Allahabad and their studies cannot be disturbed for the present academic session, therefore, in view of the discussion and observation made above, this court issues following directions :

(i) The custody of both the children; Gauri Singh and Aaroahi shall remain with father respondent No.2-Amit Kumar Singh.

(ii) Since the mother-Smt. Reeti Singh lives in Lucknow, she is permitted to meet the children on third Sunday of every month starting from February, 2024 at EL Chico Restaurant, Civil Lines, Allahabad from 11:00 A.M. till 02:30 P.M. with the condition of giving a day's prior information to the respondent No.2- Amit Kumar Singh (father) regarding her arrival at Allahabad. The respondent no.2, namely, Amit Kumar Singh will take the children to the EL Chico Restaurant, Civil Lines, Allahabad for meeting them with the mother. It is further provided that if she is in Lucknow, she is allowed to have conversation with her children by mobile phone, whats app call or video call during 8.00 P.M. to 8.30 P.M. everyday. It is made clear that both the parties will not create any nuisance at the time of meeting.

(iii) If the mother of children wants to give any gifts on account of love and affection or do anything for well being of children then father/ respondent no. 2 or any of his family members will not make any objection. However, mother shall keep in mind that such thing will be given, which are for use and safe for the children health.

(iv) The petitioner Smt. Reeti Singh is at liberty to approach the appropriate forum for claiming the custody of the children under **The Hindu Minority and Guardianship Act, 1956** or under **The Guardians and Wards Act, 1890** as the case may be in accordance with law.

37. With the above observations/directions, this habeas corpus writ petition is finally **disposed of**.

(Shamim Ahmed,J.)

Order Date :- 12.02.2024
Saurabh