

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

CRWP No.565 of 2015 (O&M)
Date of decision: 20.05.2015

Brahmi Singh

----Petitioner (s)

V/s

State of Haryana & others

-----Respondent(s)

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Aman Pal, Advocate for the petitioner(s).

Mr. Manish Bansal, DAG, Haryana.

Mr. J.S. Bedi, Sr. Advocate with
Ms. Diya Sodhi, Advocate and
Mr. Sanpreet Singh Brar, Advocate
for respondents no.4 to 7..

HARI PAL VERMA, J. (Oral)

Petitioner has filed the present writ petition under Article 226 of the Constitution of India for issuance of a writ in the nature of *habeas corpus* to release the detenues from the illegal custody of respondents no.4 to 7, who are accused of murder of mother of the detenues and further for issuance of roving writ in the nature of *habeas corpus* to raid any other place, as pointed out by the petitioner.

On the basis of the aforesaid prayer, this Court, on 9.4.2015, had passed the following order:-

“Petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus seeking release of the detenues from the illegal custody of respondents no.4 to 7, who are in their illegal custody since 2.4.2015.

Notice of motion for 13.4.2015.

Registry is directed to appoint a Warrant Officer, who shall visit the place(s), as pointed out by the petitioner and shall search for the detenues. In case, the detenues are found to be in illegal detention, they shall be got released forthwith by the Warrant Officer. The Warrant Officer, so appointed, shall submit his report well before the next date of hearing. The fee of the Warrant Officer, as fixed by the registry, shall be paid by the petitioner”.

Pursuant to order dated 9.4.2015, the Warrant Officer has submitted his report dated 10.4.2015, the relevant part of which reads as under:-

“Undersigned alongwith petitioner & his associates and Police party reached at the H.No.867, Sec.7, Kurukshetra. The main gate of the said house was locked. Undersigned knocked the door. The brother of Resp.No.4, namely Jitender Saini came out and opened the gate. After disclosing the identity and purpose of visit, undersigned asked about the alleged detenues. He took undersigned and petitioner & his associates inside the house. Undersigned found that

alleged detenues at Sr.No.1 & 4 namely Yash and Veera were sleeping with their father Pawan whereas detenues at Sr.No.2 & 3 namely Himani and Vijayesh were sleeping with their maternal aunt (Taayi). Undersigned with the help of petitioner and his associates wake them up.

Undersigned tried his best to talk to Yash and Himani but they didn't speak a word. Undersigned remained in the house of Resp.No.4 for more than an hour and observed that all the alleged detenues were frightened and were mentally upset due to tragic death of their mother and they refused to accompany petitioner & his associates and said that they wont go anywhere else. It may be possible that both the alleged detenues who were able to speak and to tell the truth about their detention were in huge influence of their father and maternal uncle & aunt and as a result they refused to go anywhere else but on the other hand they were continuously crying and were under mental stress. Undersigned also observed that they were unable to speak or understand Hindi as being British Citizens, there schooling, education and mode of communication was completely in English language.

As far as alleged detenues at Sr.No.3 & 4 are concerned, they were just 1 year of age and therefore, were unable to understand anything. Undersigned also observed that both of them remained in the lap of their Nana Brahmi Singh, Maasi Sawinder Singh & Mama Amrit Singh (petitioner & his associates) and they were able to recognize them.

Petitioner and his associates were pressing hard the undersigned to take away all the alleged detenues

from the house of Resp. No.4 and 5 but when their Maasi Sawinder Singh took Yash Kumar with him towards their car, he screamed very loudly and ran towards his father. When Himani was asked, she started crying very badly and keep on saying “mumma” “mumma”.

*While petitioner and his associates were trying hard to get the alleged detenues released from the house of Resp. no.4 and 5, Resp. no.4 and 5 were trying hard to keep them inside the house and were not allowing petitioner and his associates to take the alleged detenues away from their house. The aforesaid situation remained for more than 30 minutes and getting no outcome of the same, Undersigned took away passports of all the alleged detenues (issued by United Kingdom) and handed them over to SHO Ram Kumar. On request made by the petitioner, undersigned asked SHO to produce all the alleged detenues before the Hon’ble High Court on 13.04.2015 at 10.00 am and he assured for the same. Notice served upon to the Resp. Nos.2 to 7. Copy of e-Rojnamcha is at **Annexure ‘A’**.*

Keeping in view the facts and circumstances stated above, it is specific to mention here that undersigned was unable to assess as to whether the kids (alleged detenues) were in legal or illegal detention or not as two of them were unable to speak and understand even a word being One year of age and remaining two were under huge stress and in deep shock due to tragic death of their mother.

Undersigned left for Chandigarh at 02.30 am after completing the aforesaid proceedings and making the entry in e-Rojnamcha.

Report is submitted for His Lordship's kind perusal please."

After submission of report by the Warrant Officer, learned counsel for the petitioner has moved an application i.e. CRM No.W-143 of 2015 to place on record order dated 24.4.2015 (Annexure P4), stated to be passed by the High Court of Justice, Family Division, London (UK) under the Children Act, 1989 and the Senior Courts Act, 1981, stated to have been approached by the wife of the petitioner namely Ranjit Kaur during the pendency of present *habeas corpus* petition.

Learned counsel for the petitioner submits that since Pawan Saini, respondent no.4, who is father of the children, is facing FIR No.234 dated 2.4.2015 under Sections 302 and 201 IPC, Police Station Thanesar, District Kurukshetra for the murder of his wife, it would be unsafe to allow custody of the minor children namely Yash Kumar Saini, son (9 years), Himani Saini, daughter (6 years), Vijayesh Kumar Saini, son (1 year) and Veera Saini, daughter (1 year) to him. He further submits that the petitioner was informed about the death of his daughter namely Seeta Saini on 31.3.2015 due to heart attack. However, when the petitioner along with his daughter and son came to India on 1.4.2015 and reached the house of respondents no.4 to 7, in the evening at about 6 PM, the petitioner was shocked to see the dead body of his daughter Seeta Saini, which was shown to him from a distance only. But on seeing some bruises and marks on

her body, when the petitioner wanted to see the entire body closely, he was told that the dead body cannot be shown to them, as per the customs and can be shown only immediately before the cremation. However, the dead body was cremated without showing it to the petitioner.

Learned counsel for the petitioner further submitted that since respondent no.4 is an accused in the aforesaid FIR and the detenues/children are born citizens of U.K., the welfare of these children is unsafe in the hands of respondent no.4. Therefore, respondent no.4 be divested from the custody of the detenues and their custody be given to the petitioner who can protect the interest of the minor detenues. He further submitted that the welfare of the children, which is the paramount consideration for the purpose of custody, is quite safe in the hands of the petitioner vis-à-vis respondent no.4. Learned counsel relies upon a judgment of Hon'ble the Apex Court in the case of **Surya Vadanan v. State of Tamil Nadu & ors.** Criminal Appeal No.395 of 2015 dated 27.2.2015 to state that the Court is empowered to give custody of children even in a petition where prayer of *habeas corpus* has been made.

On the other hand, Mr. J.S. Bedi, learned senior counsel appearing on behalf of respondents no.4 to 7 states that the Ranjit Kaur wife of the petitioner had approached the High Court of Justice, family Division, London for the wardship of children. He has produced the summary of application moved by

Ranjit Kaur. The format of the application, as has been filled up, reads as under:-

“4. Why are you making this application?

<i>Please give brief details about why you are making this application including any facts you are relying on.</i>	<i>I AM MAKING THIS APPLICATION FOR MY GRANDCHILDREN. I BELIEVE THAT THEIR MOTHER (WHO IS MY DAUGHTER) WAS MURDERED BY HER HUSBAND (THEIR FATHER) ON 31 MARCH 2015 WHILE THE FAMILY WERE ON HOLIDAY IN INDIA. MY GRAND CHILDREN ARE BRITISH NATIONALS AND HABITUALLY RESIDENT IN THIS JURISIDCITON. I WANT THE COURT OF ENGLAND AND WALES TO ASSUME JURISDICTION OVER THESE CHILDREN AS IT IS LIKELY THAT THEIR FATHER WILL BE INCARCERATED AND CHARGED WITH MURDER AND THERE WILL BE NO ONE WITH PARENTAL RESPONSIBILITY FOR THESE CHILDREN. I ALSO BELIEVE THAT THE PATERNAL FAMILY OF THESE CHILDREN WILL ATTEMPT TO START PROCEEDINGS IN INDIA TO RETAIN THESE CHILDREN IN INDIA AND I DO NOT BELIEVE THAT THE INDIAN COURTS SHOULD HAVE JURSIDCTION TO DECIDE THE WELFARE OF THESE CHILDREN WHO ARE HABITUALLY RESIDENT</i>
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	<i>HERE. FURTHER I BELIEVE THAT GIVEN THE SERIOUS WELFARE CONCERNS IT IS IMPERATIVE THAT THE ENGLISH COURT ORDERS A RETURN OF THESE CHILDREN TO ENGLAND.</i>
	<i>PLEASE SEE ATTACHED STATEMENT”</i>

Thus, learned senior counsel for respondents no.4 to 7 has argued that Ranjit Kaur has approached the High Court of Justice, Family Division, London for wardship of the children on the very premises that it is likely that the respondent no.4, who is father of the alleged detenues, will be incarcerated and charged with the murder of his wife and there will be no one with parental responsibilities for the children, such plea is without any substance. He further submits that the police is already investigating the FIR and no incriminating material has come against respondent no.4, which may connect his involvement in the death of his wife Seeta Saini.

Learned State counsel does not dispute the aforesaid contention, as put forward by learned senior counsel appearing on behalf of respondents no.4 to 7, except that the matter is under investigation. Learned State counsel has not been able to point out any evidence against respondent no.4 at this stage of investigation.

No doubt, in the judgment of **Surya Vadanan v. State of Tamil Nadu & ors.** (*supra*), it has been held that the High Court has wide powers to expand the scope of *habeas corpus* by entrusting the custody of children for the welfare of the children, but such powers must be exercised on the basis of some substance. Moreover, the aforesaid judgment relates to a case where the dispute for custody of the children is between husband and the wife. But in the case in hand, the custody is being claimed by maternal grand-father viz-a-viz father of the children. Therefore, the cited authority is not applicable to the facts and circumstances of the present case. The custody of the children with the father cannot be termed as illegal and therefore, the children are not in illegal confinement. The judgment in the case of **Surya Vadanan v. State of Tamil Nadu & ors.** (*supra*) is, therefore, not applicable in the facts and circumstances of the present case.

The scope of maintainability of a writ of *habeas corpus* was dealt with by a Constitution Bench of Hon'ble the Apex Court in the case of **Kanu Sanyal v. District Magistrate, Darjeeling and others 1973 (2) SCC 674**, observing as under:-

"It will be seen from this brief history of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his

custody requiring him to bring the body of such person before the Court, but the production of the body of the person detailed is directed in order that the circumstances of his detention may be inquired into, or to put it differently, in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint. The form of the writ employed is We command you that you have in the Kings Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf. The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), the essential and leading theory of the whole procedure is the immediate determination of the right to the applicants freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end.”

In the case of **Syed Saleemuddin v. Dr. Rukhsana** **2001(4) RCR (Civil) 613**, the Apex Court has held that in the matter of writ of *habeas corpus*, for custody of minor children, the

Court is required to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. It was further held that in the matter of custody, the welfare of the children is the paramount consideration of the Court. The Hon'ble Apex Court, while relying upon **Gohar Begam v. Suggi Alias Nazma Begam and others, 1960(1) SCR 597**, observed as under:-

*“This Court in the case of **Gohar Begam v. Suggi Alias Nazma Begam and others (1960(1) SCR 597)** dealt with a petition for writ of Habeas Corpus for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan Law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. This Court further held that in issuing writs of Habeas Corpus the Court have power in the case of an infant to direct its custody to be placed with a certain person.*

From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of

Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children.

There is no dispute about the fact that the welfare of the children is required to be considered as paramount while giving custody. Since the custody of the children/alleged detainees is with respondent no.4 and he being a natural guardian, cannot

be divested with the custody of the children unless their welfare is not safe in the hand of father. The report, as furnished by the Warrant Officer, nowhere indicates that the children are not safe in the custody of respondent no.4. In a situation, when demarcation is to be drawn for the custody of children vis-à-vis father and the maternal grand-father, obviously the custody must stay with the father, unless it is established that the welfare of the children is not safe with him. The argument raised on behalf of respondents no.4 to 7 that the children were admitted in schools in India, when Seeta Saini (mother of detainee children) was alive, which gives force to the fact that even Seeta Saini was keen to get her children admitted in India.

Thus, in view of the report of the Warrant Officer, I find that the children are not in illegal custody of their father, respondent no.4, who is fully entitled to have the custody of the children in absence of any incriminating evidence against him. Since the present petition has been filed under Article 226 of the Constitution of India for issuance of a writ in the nature of *habeas corpus*, considering the fact that the custody of the children is with the father, it cannot be said that the children are in illegal detention.

Accordingly, I find no merit in the writ petition and the same is hereby dismissed.

May 20, 2015
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(HARI PAL VERMA)
JUDGE