

In the High Court of Punjab and Haryana at Chandigarh

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Criminal W.P.No.1560 of 2011 (O&M)

.....

Date of decision:13.1.2016

Unesh Rathee

...Petitioner

v.

State of Haryana and another

...Respondents

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. Surinder Saini, Advocate for the petitioner.

Mr. P.K. Jhanda, Assistant Advocate General, Haryana for the respondent-State.

Mr. Sandeep Kotla, Advocate for respondent No.2.

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Inderjit Singh, J.

Unesh Rathee-petitioner has filed this petition under Article 226 of the Constitution of India against State of Haryana and Dr. Anil Rathee-respondents for issuance of a writ of Habeas Corpus with a direction to the respondents to release Master Uday aged five years, the son of the petitioner, who is being illegally detained by respondent No.2 either at House No.659/A, Street No.2, Dayanand Nagar, Bahadurgarh, District Jhajjar or at the office of Dr. Anil Rathee, Sr. Medical Officer, General Hospital, Bahadurgarh, District Jhajjar or from any other place since 6 p.m. of May 28, 2011. It has been further prayed that a Warrant Officer be appointed to raid the premises of the respondent or any other place pointed

out by the petitioner for securing the release of her son and for handing over the custody of the child to her.

Notice of motion was issued in this case.

Mr. P.K. Jhanda, learned Assistant Advocate General, Haryana has put in appearance on behalf of respondent No.1-State and Mr. Sandeep Kotla, learned Advocate has appeared for respondent No.2 and contested this writ petition.

I have heard learned counsel for the petitioner as well as learned Assistant Advocate General, Haryana and learned counsel for respondent No.2 and have gone through the record.

From the record, I find that petitioner-Unesh Rathee is the wife of private respondent No.2 Dr. Anil Rathee. There is matrimonial dispute between them.

At the time of arguments, it was told that the minor son of the parties is now aged about 12 years. As per the arguments of the learned counsel for the petitioner, the custody of the child was with the petitioner which respondent No.2 had taken away forcibly.

On the other hand, the case of respondent No.2 is that the custody of the child was earlier with him which was forcibly taken by the petitioner and regarding which the FIR was registered and then the son had gone at his own with respondent No.2 from the Court.

A perusal of the record shows that this is a Habeas Corpus petition regarding the custody of the minor child. The custody is now stated to be with the father, whereas the petitioner is the mother. A perusal of the

record also shows that the fact regarding custody of the minor child was also disputed in the proceedings under the Protection for Women in Domestic Violence Act, which fact is clear from the document Annexure-R.2. This is an order dated 8.6.2012 vide which the Metropolitan Magistrate (Mahila Court), Dwarka, Delhi has stated as under:-

“08.06.2012

File taken up today on the application of the respondent No.1 Dr. Anil Rathi for modification of the order dated 09.06.2011 and 09.01.2012 and for stay of order dated 04.06.2012.

Dated 04.06.2012

Present: Ld. counsel for respondent with respondent No.1 in person.

It has been argued by the Ld. counsel for the respondent that previous order has been taken by misguiding the Court as to the fact and that the custody of child was originally with the respondent only. Ld. counsel for respondent has brought to the knowledge of the Court various paragraphs in main petition which state that initially the custody of the child was with the respondent. Hence, in view of the averments of the counsel for the respondent, order dated 04.06.2012 is stayed to the extent of breaking of locks. Petitioner is restrained to break open the lock of the premises in question or to obtain the custody of the child till next date of hearing.

Meanwhile, notice of the application be sent to the

petitioner for next date of hearing i.e. 20.07.2012. Copy of the order be sent to both SHOs concerned for compliance of the order. Copy of order be sent to the petitioner along with notice.

Copy of order be given dasti to respondent.

Sd/- Purva Sareen
MM (Mahila court)
DWK:08.06.2012”

The second order of the same day passed by the Court is this order. The record further shows that as per Annexure-R.7, which is dated 9.4.2013, the Court proceedings were conducted as under:-

“The respondent has brought the child today in the Court pursuant to last order. The Ld. counsel for complainant has requested to allow the complainant to meet the child in child room situated at Dwarka Court complex for one hour. The Ld. counsel for respondent has stated that either the respondent or he should be allowed to remain present during the meeting as the child may start crying. The same is opposed by Ld. counsel for complainant. After hearing rival submissions I order that the child shall meet the complainant in child room situated at Dwarka Courts complex for one hour from 11.00 a.m. to 12.00 a.m. The Ld. counsel for the respondent is allowed to remain present outside the child room and the attendants at child room shall allow the Ld. counsel for respondent to enter the child room only if the child cries and the complainant is not able to handle/control the child within reasonable time.

Put up now FP at 12.10 a.m.

Copy of order be given dasti to both the parties for compliance.

Sd/- Priya Mahendra
MM: Mahila Courts-02
Dwarka Courts:Delhi

At 11.15 a.m.

The complainant as well as Ld. counsel for respondent, respondent and child have appeared in the Court. It is stated by Ld. counsel for the respondent that the child was inconsolable in the child room and in these circumstances he has brought back the child. The complainant has contended the contrary. At the joint suggestions of Ld. counsels for both the parties, it is agreed that child is allowed to meet the mother in the presence of Smt. Nivedita, Principal Counsellor, Family Courts. Both the parties along with child shall remain present before Smt. Nivedita, Principal Counsellor, Family Courts at 2.10 p.m. So that complainant can meet the child in her presence. The Principal Counsellor shall be at liberty to allow the father to remain present at the time of meeting only if she deems fit considering the circumstances. Otherwise, the respondent shall not remain present at the time of meeting. The duration of meeting shall also be decided by the counselor.

Copy of order be given dasti.

Sd/- Priya Mahendra
MM: Mahila Courts-02
Dwarka Courts:Delhi

At 4'O clock.

Present: Complainant in person with Ld. counsel Sh.
Anirudh Yadav.

Respondent in person with Ld. counsel Sh. A.N.
Aggarwal.

Ld. counsel for respondent has stated that inadvertently he has not placed his Vakalatnama in the morning and is filing the same now. Same is taken on record.

Vide order dated 10.12.2012 my Ld. predecessor granted visitation rights to complainant as per Section 21 of DV Act. The said order could not be carried out for the reasons for which parties are blaming each other. Taking into consideration the entire situation, the respondent was directed to bring the child today so that the complainant can meet the child Uday aged around 7 years in the Court. Initially, the Court directed the complainant to meet the child in the child room for one hour from 11.00 to 12.00 a.m. But at 11.15 a.m. the parties appeared and stated that the said arrangement could not be carried out and again blamed each other for the same. In view of the same this Court ordered the child to meet the complainant before Principal Counsellor. Ms. Nivedita Sharma. The meeting took place in the presence of Principal counselor and a psychologist. Now the report has been received

from the said Principal Counsellor to the effect that the father was very apprehensive to leave the child alone. The child interacted with ease with the counselor but refused to open up with the mother despite the best efforts made by the Principal Counselor and psychologist.

This present case has a chequered history where both the parents are fighting tooth and nail for having custody of Master Uday who is barely 7 years old. In fact one kidnapping case was registered at the behest of respondent against the brother of complainant for kidnapping Master Uday and thereafter one kidnapping case was registered against the respondent at the instance of complainant for kidnapping Master Uday. The Hon'ble High Court, Punjab and Haryana while granting anticipatory bail to the respondent in a kidnapping case registered against him made the observation that the final custody of the child shall be decided by the Guardianship Court. However my Ld. Predecessor invoked her power u/s 21 of DV Act and granted visitation rights to the complainant.

It is settled law that in custody cases, the welfare of the child is paramount. No order can be passed having effect of damaging the psyche of minor child. The report clearly reflects that the child is very clinging to the respondent and if the child is forced to interact with the mother against his wishes then it can adversely affect his psychology and health. Moreover the

Protection of Women in Domestic Violence Act, 2005 only empowers the Court in exceptional cases to decide the temporary custody and issues of visitation right of the child. Ordinarily, such issues are decided by Guardianship Courts specifically constituted for the said purpose. The Hon'ble High Court, Punjab and Haryana has already stated during the decision of anticipatory bail of respondent that the final custody of child shall be decided by Guardianship Court. Keeping in view the circumstances in entirety, both the parties are directed to approach the Guardianship Court for deciding the issue of custody and visitation rights of the child Master Uday.

The petition u/s 12 of Protection of Women in Domestic Violence Act already stands disposed off. File be consigned to R/R.

Sd/- Priya Mahendra
MM: Mahila Courts-02
Dwarka Courts:Delhi”

The order Annexure-R.7 passed by the Metropolitan Magistrate, Mahila Court, Dwarka Courts, Delhi, shows that respondent Dr. Anil Rathee had brought the child in the Court pursuant to the earlier order. Learned counsel for the complainant/petitioner requested to allow the complainant to meet the child in the child room. The Court allowed the complainant to meet the child in the child room for one hour from 11.00 to 12.00 a.m. etc. Then on the same day it was also ordered that both the parties along with child shall remain present before Smt. Nivedita Sharma, Principal

Counsellor, Family Court at 2.10 p.m. so that the complainant can meet the child in her presence. The Court in the order passed on the same day held that it is settled law that in custody case the welfare of the child is paramount. No order can be passed having the effect to damage the psyche of the minor child. The report clearly reflects that the child is very clinging to the respondent and if the child is forced to interact with the mother against his wishes, then it can adversely affect his psychology and health. It is also stated in the order that moreover the Protection of Women in Domestic Violence Act, 2005 only empowers the Court in exceptional cases to decide the temporary custody and issues of visitation rights of the child. Ordinarily, such issues are decided by Guardianship Courts specifically constituted for the said purpose. It is also mentioned in this case that Hon'ble High Court of Punjab and Haryana has already stated during the decision of anticipatory bail of respondent that the final custody of child shall be decided by Guardianship Court. The Court directed both the parties to approach the Guardianship Court for deciding the issue of custody and visitation rights of the child Master Uday.

Keeping in view the fact and the orders of the Metropolitan Magistrate and the fact that the child was produced in the court proceedings there and the Court had already directed the parties to approach the Guardian Judge for deciding the issue regarding the custody, no further action is required to be taken in the present Habeas Corpus Petition. In no way, it can be held for the purpose of Habeas Corpus petition that the child has been illegally detained against his wishes by the respondent. It is purely

a dispute regarding the custody of the child between the father and the mother which is to be decided by the Guardian Judge.

Therefore, in view of the facts and circumstances of the present case, no action is required to be taken in this petition.

Finding no merit in the present petition, the same is dismissed.

January 13, 2016.

(Inderjit Singh)
Judge

hsp