

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

Criminal Writ Petition No.14 of 2016

Date of Decision: January 08, 2016

Satinder Kaur

...Petitioner

Versus

State of Punjab & Anr.

...Respondents

CORAM: HON'BLE MR. JUSTICE NARESH KUMAR SANGHI

Present: Mr.Dinesh Trehan, Advocate,
for the petitioner.

1. Whether Reporters of Local papers may be allowed to see the judgment? yes

2. To be referred to the Reporters or not? yes

3. Whether the judgment should be reported in the Digest? yes

Naresh Kumar Sanghi, J.

The present petition under Article 226 of the Constitution of India has been filed by Satinder Kaur (wife) against Satnam Singh (husband) for issuance of a writ in the nature of habeas corpus to produce Rajbir Singh Gill, the minor son aged about two years of the private parties and to hand over him (minor son) to Satinder Kaur.

Learned counsel for the petitioner submitted that Rajbir Singh Gill was only two years old and as such, only the petitioner could look after him; respondent No.2 has illegally detained Rajbir Singh Gill; while deciding the cases like the petition in hand, the Court should see the welfare of the minor child and that respondent No.2 was residing all alone in H.No.HM-4, Phase IV, S.A.S.Nagar (Mohali) and would not be able to pay full attention for fairly

bringing up of Rajbir Singh Gill and as such, the writ in the nature of habeas corpus be issued and respondent No.2 be directed to produce Rajbir Singh Gill to hand over him to the petitioner. In support of his contention, learned counsel has placed reliance on a Division Bench judgment delivered by Hon'ble Orissa High Court in the matter of Swapna Satpathy @ Upadhyaya vs State of Orissa and others, 2014 (137) AIC 332 and a Division Bench judgment of this Court in the matter of Bimla and others vs. Anita 2015(3) RCR(Civil) 153.

I have heard leaned counsel for the petitioner and with his able assistance gone through the material available on record.

There is no gainsaying that while dealing with the cases relating to handing over of the custody of the minor child to either of the private parties the paramount factor to be considered by the Court is the welfare of the child.

The question waiving in the mind of this Court is that where disputed question of facts are available on record, in that scenario, should the Court while exercising the jurisdiction under Article 226 of the Constitution of India summarily hand over the custody of the minor child to either of the parties.

In both the judgments cited by learned counsel for the petitioner it has been held that paramount consideration before the Court should be the welfare of the child. The facts narrated in the petition and argued by learned counsel for the petitioner would clearly spell out that there are certain disputed questions of facts

involved in the present petition.

The petitioner has alleged that it was her second marriage with respondent No.2. In the year 2014 she gave birth to Rajbir Singh Gill. On 08.11.2015, respondent No.2 took away Rajbir Singh Gill without any prior information. When called by the petitioner, respondent No.2 did not respond on the mobile phone and as such, the matter was reported to the police. After two days on receipt of the information from Police Station, Phase I, S.A.S.Nagar (Mohali), the petitioner in the company of her parents went there and met her child but respondent No.2 did not return Rajbir Singh Gill to her (petitioner No.1) and told that the custody of the child would be handed over to the petitioner only when the property situate in Phase IV S.A.S Nagar (Mohali) was transferred in the name of respondent No.2 (husband). The police showed its inability to get the minor son restored to the petitioner on the ground that respondent No.2 was the father of the child and he could have the custody of the said child.

It has nowhere emerged on record that respondent No.2 had no means or time to look after the minor child.

The issues under what circumstances respondent No.2 (husband of the petitioner) was in custody of the minor child; under what circumstances the husband and the wife (petitioner and respondent No.2) are residing separately; as to whether prior to 08.11.2015 the petitioner was properly maintaining the child; respondent No.2 had illegally detained the minor child on the

premise of transfer of the property situate in Phase IV S.A.S.Nagar (Mohali) in the name of respondent No.2 and that he would not be in a position to watch the welfare of his own son Raj Bir Singh Gill. In the matter of **Sumedha Nagpal vs. State of Delhi & Ors, 2000(9) SCC 745**, Hon'ble the Supreme Court while dealing with writ jurisdiction relating to an issue of a minor child of tender age of about two years held that disputed questions of facts involved cannot be decided without recording evidence and a proper decision in such a matter was impossible in a summary proceeding such as writ petition. The parties to the *lis* were relegated to work out their respective rights in an appropriate forum like Family Court or District Court under Hindu Minority and Guardianship Act.

Though Hon'ble Division Bench of Orissa High Court had ruled that writ of habeas corpus can be issued for restoring the custody of a minor child to the mother if the custody was wrongful yet taking into consideration the ratio of the judgment delivered by Hon'ble the Supreme Court, this Court finds that disputed questions of fact are involved in the present case and it cannot be ruled that in all probabilities the welfare of Rajbir Singh Gill cannot be watched by respondent No.2 i.e his father and husband of the petitioner. The judgment relied upon by the petitioner in the matter of **Bimla's** case (supra) was not arising out of under Article 226 of the Constitution of India and in the said case the appeal was filed against the judgment passed by learned Court below while dealing with a case under Section 6 of the Hindu Minority and Guardianship Act.

In the matters of **Smali Bagga** vs. **State of Punjab & Ors.**
1997 Criminal Law Journal 45 and **Lalit Mohan** vs. **State of Punjab & Ors.**, 2015(4) RCR(Criminal) 72, this Court held that habeas corpus petition by wife claiming custody of her minor child was not maintainable.

As a sequel to the above discussion, this Court finds that disputed questions of facts are involved in the present petition which cannot be decided summarily while dealing with a petition under Section 226 of the the Constitution of India.

If so advised the petitioner may take recourse before appropriate Court below in accordance with law.

As a sequel to above discussion, there is no merit in the present petition and the same is hereby dismissed.

January 08, 2016
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(Naresh Kumar Sanghi)
Judge