

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

**CRWP No.68 of 2017
Date of Decision-07.03.2017**

Kirandeep Kaur ... Petitioner

Versus

State of Punjab and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. V.K. Sandhir, Advocate for the petitioner.

Mr. Shilesh Gupta, Add, AG, Punjab.

Mr. Vipin Mahajan, Advocate for respondents No.4 to 6.

RAJ MOHAN SINGH, J.

[1]. Petitioner has filed this criminal writ petition for issuance of appropriate writ in the nature of habeas corpus directing respondents No.4 to 6 to produce the minor child (Master Bir Partap) aged more than six months (date of birth 02.08.2016) who is alleged to be in illegal custody of private respondents. Petitioner seeks custody forthwith.

[2]. Petitioner alleged that her marriage was solemnized with respondent No.4 on 05.01.2014 according to Sikh rites and ceremonies. The marriage was solemnized with all pomp and shows and huge dowry and gifts were given in the marriage. Marriage went in rough weather and the couple started behaving indifferently. Petitioner is serving as clerk in Punjab Roadways. Respondent No.4 is serving

as Auction Recorder in Mandikaran Board. Petitioner further alleged that when she was pregnant, she was harassed and petitioner and respondent No.4 were turned out of the house by respondents No.5 and 6 in September, 2015. They started living as a tenant in the rented house. Respondent No.4 also harassed the petitioner and filed pre-litigation mediation before the High Court, where the petitioner appeared on 18.02.2016, 25.02.2016 and 04.03.2016. Petitioner alleged that filing of said case was in order to escape the criminal liability. When the cruelty did not stop, petitioner filed a complaint before the police on 09.06.2016. Petitioner was in advance stage of pregnancy and by taking the benefit of such advance stage, private respondents obtained some signatures of the petitioner by alleging that the same were required in the compromise. On 02.08.2016, petitioner was blessed with a male child. On the next date on 03.08.2016, private respondents illegally and forcibly took away the infant son from the custody of the petitioner on the pretext of his examination by pediatric specialist. The forged divorce was also written on 06.07.2016.

[3]. The birth of the child was on account of cesarean operation. Petitioner was not physically fit to react immediately and agitate against the action of the private respondents. However, on becoming physically fit and after removal of stitches on 11.08.2016, petitioner made an effort to take custody of infant, but could not succeed. Thereafter, petitioner filed a petition under Section 25 of the Guardians and Wards Act, 1890 for custody of minor son. The said

petition is pending. Private respondents have also filed an application under Section 9 of Hindu Marriage Act in order to exert pressure upon the petitioner. During pendency of the petition under Section 25 of the Guardian and Wards Act, the present petition for habeas corpus came to be filed in this Court.

[4]. I have heard learned counsel for the parties.

[5]. Learned counsel for the petitioner vehemently contended that the welfare of the child is of paramount consideration and the mother cannot be deprived of infant child who is hardly six months of age as on date. Learned counsel for the petitioner relies upon **Amita Chhabra Vs. State of Haryana and others, 2015(1) RCR (Civil) 43, Gippy Arora Vs. State of Punjab and others, 2012(4) RCR (Civil) 397, Kiran Rani Vs. Krishan Kumar and others, 1995 (1) RCR (Criminal) 430, Gohar Begum Vs. Suggi @ Nazma Begum and others, 1960 AIR (SC) 93** and contended that the High Court has got the powers under habeas corpus petition to decide the custody of the minor *ad interim* till decision by the Guardian Court in accordance with law. Habeas corpus petition is maintainable when custody of the minor is claimed by the mother. Learned counsel further contended that the custody issue has to be appreciated on the proverbial universally accepted superiority of the natural mother's instinctive selfless love and affection of her children, particularly infants. Motherly care and affection is indispensable for the healthy growth of the minors. The selfless interest of mother in welfare of her children is by and large

found to be part of her nature. This instinct is not confined to human race alone. No one else can provide love and affection to children as mother can, as lap of mother is God's own cradle for children.

[6]. Learned counsel further emphasized that the alleged divorce and settlement qua the custody of minor before delivery of the same have no bearings on the custody issue of minor. Now at the instance of the petitioner, the manner in which the child has been taken away from the petitioner cannot have approval and sanction of law. The husband should have adopted legal recourse to take custody of the infant. Since the custody issue is pending before the competent Court, therefore, as an interim measure, interim custody of the child can be given to the petitioner till decision of the petition before the competent Court.

[7]. Petitioner claimed that the compromise was fraudulently executed. In fact, there was no payment of Rs.10 lacs and her signatures were obtained at the time when she was in advance stage of pregnancy. Even panchayati talaknama was allegedly written. The divorce petition has also been filed by the respondent-husband wherein the petitioner-wife has been served with the notice. Despite the aforesaid facts, petitioner-wife has shown her willingness to pay back the amount of Rs.10 lacs without prejudice to her civil rights at a subsequent stage. Learned counsel further contended that in the pending case of custody issue before the competent Court, an application for interim custody was also moved, but the same was not

decided, rather the application filed by the respondent-husband on the issue of jurisdiction was preferred.

[8]. On the other hand, learned counsel for the respondents submitted that the marriage was simple. Immediately after the marriage dispute arose between the parties as the petitioner is a head strong lady and often pick up quarrels on petty issues. Due to temperamental difference between the parties, the atmosphere of the house remained tense. As a result of that, the couple moved out of the matrimonial house and they started living in a tenanted premises. Even while living as tenant, the behavior of the petitioner did not improve. The respondent-husband was under suspicion that the petitioner was having some intimacy with her cousin brother namely Dharminder Singh and she was acting on the instructions of Dharminder Singh in the matrimonial house and rented accommodation. Dharminder Singh has been visiting in the house in the absence of husband and has also developed illicit relations with the petitioner. In fact, said Dharminder Singh did not allow the couple to settle down and was the root cause of dispute between them. Respondent-husband approached the High Court at a pre-litigation stage in order to avoid future litigation and to put an end to the controversy, but the same ultimately failed. The complaint filed by the petitioner was investigated by the police and at that stage, a compromise was arrived at between them. According to that compromise, petitioner agreed to take Rs.18 lacs towards full and final settlement and the couple was to move Court for divorce by way of

mutual consent. Petitioner was also required to give custody of the child who was yet to be born immediately after the delivery to the respondent-husband and the petitioner would not claim any custody of the child, nor would file any case in future. As per terms and conditions of the compromise, the petitioner had received Rs.10 lacs on 06.07.2016. A panchayati talaknama was executed on 06.07.2016 which was reduced into writing and both the parties signed the same and receipt of Rs.10 lacs was also signed by the petitioner. The child was born on 02.08.2016 at 10:08 PM. As per the compromise, custody of the child was handed over to the respondent-husband by the petitioner and her family members in the presence of Sarpanch of the village. The delivery of the child was pre-mature in nature and they took all possible care of the child. The child was taken to Delhi and efforts were made to improve the health of the child. As on date, child is about 6 months of age and weighing 8-9 kgs.

[9]. Learned counsel for the respondents very vehemently contended that factum of compromise was admitted by the petitioner and now she has backed out and has shown her readiness to refund the amount of Rs.10 lacs. Learned counsel relied upon **Aditya Gaur Vs. State of Haryana and others, 2014(2) RCR (Criminal) 190, Lalit Mohan Vs. State of Punjab and others, 2015(4) RCR (Criminal) 72** and **Om Pati Vs. Suraj Bhan, 1997 (4) RCR (Civil) 6** and contended that habeas corpus petition for custody of the child is not maintainable. The welfare of the child is basically a question of fact which requires evidence. In the absence of such evidence, exercise of extra ordinary

jurisdiction of the High Court is not proper. In the absence of any material on record to conclude that minor is not properly kept, the custody cannot be given, nor there are allegations that the minor is being kept by the private respondents by way of improper detention. Custody of the minor with his father cannot be stated to be illegal and habeas corpus petition is not maintainable.

[10]. Learned counsel further contended that the welfare and interest of the minor are of paramount consideration while deciding the custody issue of the child. The petition is pending before the competent Court. After the birth of the child and after having taken the amount, the petitioner kept mum for more than 5 months. The custody of the minor is not illegal with his father, nor the same was on account of any force. As to how the welfare and interest of minor can be best served, cannot be decided in a habeas corpus petition in the absence of material on record.

[11]. I have considered the submissions made by learned counsel for the parties.

[12]. In fact both the parties have tried to project their cases in the background of alleged compromise and the custody of the child. At this stage, since this case is not pertaining to any remedy under Hindu Marriage Act, therefore, the scope of the petition strictly confined to custody issue of the minor even during pendency of the petition under Section 25 of the Guardians and Wards Act.

[13]. Having considered the issue, I am of the view that so far as natural instinct of the mother in favour of infant is concerned, the same *prima facie* does not require any such evidence to show that the mother is not having any selfless interest in motherly care and affection towards the child which in my considered view is indispensable for the healthy growth of the minor. The selfless interest of the mother for the welfare of the infant is a natural instinct of the mother, rather this instinct is not confined to human being alone. None else can provide such love and affection to the minor except the mother who is having God's own cradle.

[14]. Since the child is of very tender age and requires breast feeding, paramount consideration is welfare of child and it requires evidence to determine whether ultimate interest of minor would be in the custody of mother or father. This issue has to be decided by the competent Court in the pending petition. However, till decision by the competent Court, welfare of the child lies in the company of the petitioner/mother. Both the parties already approached the Court. The facts are not disputed on broad lines. The issue only appears to be with regard to interim custody till final adjudication by the Court in respect of custody issue of the minor.

[15]. It is a settled principle by now that habeas corpus petition at the instance of the mother for production of child is maintainable. There is no rule of law that all cases of production and custody of the child by natural guardian should be dismissed merely because it is for

the other Court to determine the question of welfare of minor child in custody of another person. The allegations of fraud in executing compromise cannot be gone into at this stage. The issue is only that till disposal of custody issue by the competent Court, the custody of minor of tender age can be given to natural mother. For forming such an opinion, I am fully fortified by the view expressed by this Court in **Kran Rani's case (supra).**

[16]. In view of aforesaid, this petition is allowed to the extent of giving custody of the minor infant to the petitioner till the disposal of custody issue of minor by the competent Court. Till such decision, the minor shall remain in the interim custody of the petitioner. Custody of minor shall be given to the petitioner forthwith. This petition is disposed of accordingly.

[17]. Nothing expressed hereinabove would be construed to be an expression of any opinion on the ultimate merits of the case involving custody issue of minor before the competent Court.

(RAJ MOHAN SINGH)
JUDGE

07.03.2017

Prince

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No