

HIGH COURT OF CHHATTISGARH, BILASPUR

WPHC No. 15 of 2016

- Smt. Jyoti Chaturvedi D/o Shir S.K. Tiwari, Aged About 31 Years Caste Brahman, R/o N.E. 51, C.S.E.B. Colony Korba, East Civil And Revenue District Korba, Police Station Rampur, Distirct Korba Chhattisgarh.

---- Petitioner

Versus

- State Of Chhattisgarh Through Its Secretary Home Department, Mantralaya, Capital Complex, Mahanadi Bhawan, Nw Raipur Police Staiton Raipur Civil And Revenue District Raipur Chhattisgarh, Chhattisgarh
- Director General Of Police, Raipur Distirct Raipur Chhattisgarh, District : Raipur, Chhattisgarh
- Superintendent Of Police, Bilaspur, Distirct Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh
- Police Station Sarkanda, Through Its Station House Officer, Tahsil And Distirct Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh
- Jagdish Prasad Dwivedi, S/o Late Shri Baldev Prasad Dwivedi, Aged About 79 Years R/o Gali No 2, Jabdapara, New Sarkanda, Below Purana Pul, Police Station Sarkanda, Civil And Revenue District Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh
- Indira Dwivedi, D/o Jagdish Prasad Dwivedi, Aged About 50 Years R/o Gali No 2, Jabdapara, New Sarkanda, Below Purana Pul, Police Station Sarkanda, Civil And Revenue District Bilaspur Chhattisgarh , District : Bilaspur, Chhattisgarh
- Shishir Dwivedi, S/o Jagdish Prasad Dwivedi, Aged About 33 Years R/o Gali No 2, Jabdapara, New Sarkanda, Below Purana Pul, Police Station Sarkanda, Civil And Revenue District Bilaspur Chhattisgarh , District : Bilaspur, Chhattisgarh

---- Respondents

For Petitioners	:	Shri Ashutosh Pandey, Advocate
For Respondent No.1 to 5	:	Shri UNS Deo, Government Advocate
For Respondent No.5 to 7	:	Shri Anant Bajpai & Shri SS Rajput, Advocates

Hon'ble the Chief Justice
Hon'ble Shri Justice Pritinker Diwaker

ORDER

Per P. Diwaker, J

19/07/2018

1. The petitioner has approached this Court with this writ petition seeking issuance of a writ of habeas corpus commanding respondents No.5 to 7 to produce minor girl named Sambhavi from their illegal detention and to handover her custody to the petitioner, her mother.
2. Facts of the case, in brief, are that the marriage of petitioner with Santosh Dwivedi, son of respondent No.5, took place on 10.2.2007 and out of their wedlock, a female child namely Shambhavi was born on 4.12.2009. Her husband breathed his last on 10.2.2017. After the death of her husband, her in-laws started harassing her and on 14.2.2014 she along with her daughter was ousted by her in-laws from the house. Thereafter the petitioner got remarried to one Rajiv Chaturvedi and started living with him at Varanasi along with her daughter. When said Shambhavi came to spend her summer vacation with her grand father (respondent No.5), she complained about the treatment meted out to her by her step father & mother (petitioner) and therefore they have decided not to send back the girl to them. The petitioner thereafter filed an application under Section 97/98 of the CrPC before the Sub Divisional Magistrate, Korba seeking custody of minor girl. The Sub Divisional Magistrate vide order dated 5.2.2016 ordered for handing over the custody of minor girl to the petitioner. This order was challenged by respondents No.5 to 7 before the Single Judge by filing WPCR No.40/2016 and the writ court considering the pendency of revisions filed by both the parties before the Sessions Court, Korba stayed the effect and operation of order dated 5.2.2016 for a

period of three years or till the application for stay is taken up for hearing and decided by the Sessions Court. The Sessions Judge, Korba vide order dated 11.4.2016 allowed the revision preferred by respondent No.5 to 7 and set aside the order dated 5.2.2016 passed in favour of the petitioner herein. Having failed in her attempt to get the custody of her daughter under the criminal proceedings, the captioned habeas corpus petition has been filed by the petitioner. During the pendency of petition, in pursuance of the order dated 16.11.2016 passed by this Court, the minor girl has been produced before the Court and when the minor girl was questioned by the Court in Chamber whether she wanted to go to her mother, she refused to live with her mother. However, keeping in mind the welfare of the child, the Court impressed upon the parties to try and settle the dispute amicably and both the parties volunteered for mediation, therefore, the matter was referred to the mediation where they have resolved their disputes amicably. It was agreed between the parties, as is discernible from the settlement itself, that the minor child would be allowed to remain in the custody of respondent No.5. However, subsequently the petitioner has resiled from the settlement arrived at between the parties in the mediation centre, which is admittedly signed by the petitioner and her advocate. Hence this petition.

3. We have heard learned counsel for the parties and also gone through the material available on record.
4. If we trace the historical development of the writ of Habeas Corpus, it can be seen that the phrase "Habeas Corpus" (meaning "you have the body") simply represented a command, issued as a means or interlocutory process, to have the respondent to an action brought physically before the court. In **R. v. Secy. of State for Home Affairs** reported in (1941) 3 All

ER 104, 105, it has been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue. In the matter of **Union of India v. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another** reported in **(2007) 10 SCC 190** while explaining the nature of writ of habeas corpus, their Lordships of the Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a *prima facie* case of his unlawful detention. Paragraph 7 of the judgment reads infra;-

"7. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of "illegal detention" with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

5. Sometimes, a writ of habeas corpus is sought for custody of a minor child. The Courts of law in this country have had occasion to consider whether writ of Habeas Corpus can be issued in the matter of custody of minor children and it has been held that a writ of habeas corpus can be issued against the father/mother of a minor child if it was established that he/she

had taken away the child unlawfully from the custody of the father/mother and/or it is found that the child seeking whose custody the habeas corpus petition has been filed is in illegal detention or custody of the respondent concerned. However, in such cases also, the paramount consideration which is required to be kept in view by a writ Court is 'welfare of child'.

6. Thus, it is well established that an “illegal detention” is a condition precedent for moving a habeas corpus petition. Further, a writ of Habeas Corpus can also be issued at the instance of the parent for the production of a minor in the Court when there is illegal detention or wrongful custody. Thus, in the present case we have to examine at the first instance, whether the minor girl Shambhavi is illegally detained or wrongfully confined by respondents No.5 to 7 as the illegal detention or wrongful confinement is a precondition for issuing the writ of habeas corpus.

7. From the record of the case it is apparent that during the hearing of petition it was found expedient that respondents No.5 to 7 produce the girl child in Court and accordingly 13.12.2016 was fixed for such production of the child. On 13.12.2016 the girl child was produced by respondents No.5 to 7. She was asked questions by the Court in Chamber to which she replied. To a question asked by the Court whether she wanted to go to her mother (petitioner), she expressed not to go with her mother. When she was asked by the Court as to why she does not want to go and live with her mother, she replied that her mother used to beat her and therefore she does not want to live with her. Thus, the replies given by the minor girl, as are discernible from the order sheet dated 13.12.2016, give an impression that she is not under confinement or illegal detention as alleged by the petitioner. Merely because she was produced in Court from the custody of her grand-parents that will not cause dent to the

truthfulness of her statement. It is an innocent expression of a minor and it cannot be said that the child was tutored.

8. That being the position, there is no reason before us to form an opinion that petitioner's daughter is being illegally detained by respondents No.5 to 7. Allegation of illegal confinement and detention of minor child appears to be a pure imagination of the petitioner and being so, the petition for habeas corpus has to fail.
9. For the reasons stated above, we see no reason to issue a writ of habeas corpus in favour of the petitioner and accordingly this habeas corpus petition stands dismissed.
10. It is made clear that if the petitioner wants to have the custody of minor girl, she is free to avail appropriate remedy before the appropriate forum for the purpose of seeking custody of minor girl Shambhavi.

Sd/-
(Ajay Kumar Tripathi)
Chief Justice

Sd/-
(Pritinker Diwaker)
Judge

roshan/-