

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

CRWP-3013 of 2020 (O&M)

Date of Decision: 01.06.2020

Neha

...Petitioner

Versus

State of Haryana & Ors

... Respondents

CORAM:- HON'BLE MR. JUSTICE ARUN MONGA

Argued by:- Mr. Divyajot Sandhu, Advocate,
along with the petitioner.

Mr. Hitesh Pandit, Addl.AG Haryana.

Mr. A.D.S. Sukhija, Advocate
along with respondent No.4.

(Matter taken up and presence recorded through video conferencing)

ARUN MONGA, J.

1. This criminal writ petition has been filed by one Ms. Neha for custody of her minor daughter, namely, Trisha aged about 4 years, who was allegedly taken away by her father in a clandestine manner.
2. The petition came up for hearing for admission on 04.04.2020 during Covid-19 lockdown period through video conferencing. Notice of motion was issued and the husband-respondent No.4, who is having the alleged illegal custody of the minor girl, was directed to remain present in person along with minor child on the next date of hearing. Upon service, respondent-husband filed a detailed reply controverting the pleas taken in the petition. The matter was then taken up for final hearing and learned counsels were heard in presence of both the parents. Petitioner (mother) as

well as respondent No.4 (father) are educated professionals from reputed institutions, were also heard in person. Mother is stated to be B.Tech in electronics and telecommunications with honors and father is B.Tech followed by MBA.

3. Brief facts as contended by the petitioner. Marriage between petitioner and respondent No.4 took place on 12.12.2012 as per Hindu Rites. They started living at matrimonial home bearing Flat No. 1290, Silver City Greens, Zirakpur, which is owned by father of respondent No.4. Out of wedlock, a girl child Trisha was born on 16.05.2016. It is stated that sometime on or about 07.09.2019, the husband, in a pre-planned manner, which unfolded later, shifted the matrimonial home to Flat No. 203, Block-B, GH-86, Sector 20, Panchkula. The petitioner as well as minor daughter Trisha also shifted to the new matrimonial home. However, on 16.11.2019 respondent No.4 along with the minor daughter went to his Zirakpur paternal house on the disguise of her medical treatment. Respondent No.4 initially told the petitioner that he will come back after 15-20 days as he was getting treatment for Trisha who is suffering from congenital 'Talipes Equinovarus' (foot abnormality). Later, it turned out to be a pre-planned conspiracy as respondent No.4 simply deserted the petitioner and started staying with his father at Zirakpur flat. Respondent No.4 told petitioner that he would return after 15-20 days as he was getting treatment for Trisha and kept on saying so for couple of months.

4. Initially, contended the petitioner, she did not take any action hoping that things would settle down and the custody of the daughter would be restored by respondent No.4 on his own. Later a police complaint dated 22.02.2020 (Annexure P-2) was submitted by her at Police Station Sector

20, Panchkula, but no action was taken by police. Rather, in the meanwhile, respondent No.4 filed a guardianship petition dated 19.12.2019 (Annexure P/1) against petitioner under Section 25 of Guardianship and Wards Act, 1890 (for brevity, 1890 Act), wherein; false averments against the petitioner have been made. Finding no other way, instant petition has been filed by the petitioner seeking release of her daughter from alleged illegal custody of respondent No.4, asserting that she is legally entitled to get custody of minor daughter who is just 4 years old.

5. Respondent No.4-husband in his return has controverted the averments of the petition. He admitted that minor child is in his custody since 16.11.2019, but urged that the scope of interference by way of writ of habeas corpus is confined to the matters of illegal custody. Being father, contended respondent no.4, in no way, can be termed to be in unlawful custody of his minor daughter. According to him, the child is in his custody as petitioner has abandoned both of them. Ever since the said abandonment, he is taking proper care of the child and her welfare, which is of paramount consideration and has also filed a petition under 1890, Act.

6. It is averred by respondent no.4, that petitioner has filed the petition on false and flimsy grounds. She has no love and affection for the child and has abandoned the child. She, on appearance in guardianship proceedings, never made any prayer for interim custody of the minor. Much has also been said about the conduct and attitude of the petitioner towards her in-laws family to claim that she is a stubborn, self centered, short tempered lady and had voluntarily abandoned the family. Respondent No.4 has averred that he is having privilege to work from home, whereas petitioner has no time to attend the minor child. It is stated by respondent No.4 that the instant

petition has been filed by the petitioner just to disturb the comfort and custody of the child by alleging wrong facts. He is in better position than mother-petitioner to look after the welfare of the child and thus dismissal of the petition has been sought.

7. I have heard respective learned counsels of the parents of minor child as well as learned State counsel and also both the parents in person.

8. At the threshold, learned counsel for respondent No.4 argued that the writ petition is not maintainable, as custody of the child with her biological father cannot be construed as illegal by any stretch of imagination. This Court, therefore, ought not to exercise its jurisdiction to issue a writ in the nature of habeas corpus. The maintainability of the writ petition has also been objected on the ground that alternative remedies are available to both the parties. In as much as, Guardian/Civil Judge, Dera Bassi is already seized of the custody dispute of the minor daughter. The father has already instituted a petition under Section 25 of 1890 Act, seeking permanent custody. Learned counsel for the respondent No.4 points out that petitioner has caused appearance in the custody case and has preferred not to file any application for interim custody of the minor daughter. Therefore, by her acquiescence, she seems to have agreed to the interim custody of the child being with the father till the final decision with regard to permanent custody is given by the concerned Court.

9. While on the other hand, learned counsel appearing for the petitioner submitted that custody of the minor child with father is most certainly unlawful, given the tender age of the minor daughter, who is barely four years old. Minor has throughout been with her mother/father ever since birth till 16.11.2019, when the father exclusively took her away to his

paternal house stating that he would return in few days. He also argued that the petitioner did not take any immediate action against her husband as she was under a *bonafide* impression that he would soon return along with the daughter. Furthermore, argued the learned counsel for the petitioner, that even though the petitioner had also been aggrieved on the matrimonial front, but in order to maintain cordiality and peace she chose not to precipitate the issues by rushing to institute any civil and/ or criminal proceedings. Learned counsel for the petitioner also argued that the misconduct and the conspiring mind set of the husband is reflected from a bare look at the events, and in the manner, he instituted custody petition, after having repeatedly misled the petitioner that he would soon return to the matrimonial home along with the daughter.

10. Before proceeding further in the matter, this Court would like to observe that even though there are allegations and counter allegations between petitioner and respondent No.4 with regard to their *inter se* matrimonial conduct, but the same are best left undealt at this stage. Paramount herein is, as to what serves best in the interest and welfare of the minor daughter so as to continue her exclusive interim custody either with father or the mother ? It is for the appropriate Court to deal with those inter-se spousal allegations in appropriate proceedings.

11. Adverting now to the interest and welfare of the child and consequent result thereof, as to which of the spouse should have the custody of the minor daughter, during their separation, this Court would like to observe that merely because other remedies are available to the parties, would not render the present petition not maintainable. It is settled position in law that a writ of habeas corpus is maintainable to ensure the safety/

security, welfare and happiness of a minor child. In such matters, what has to be decided is not merely the legal rights of the spouses involved but more predominantly, the criteria to be adopted by Court is as to what is more in the interest and welfare of the minor child rather than the interest of the parents. After all, every child is a national asset. It is the bounden duty of court also to watch and ensure the welfare and interest of a child in trouble, that best suits for his/her upbringing. Not to say, that parental love and affection, their rights and duties vis a vis their child are to be undermined, in any manner. Court is only to supplement, after weighing all the pros and cons.

12. In the present case, it is the conceded position that minor daughter is suffering from a congenital problem. She not only requires constant medical care but special attention too. In the counter affidavit father of the child has appended medical proof of her treatment along with the expenses being borne by him towards the said treatment. The same would go on to show that the upbringing of the minor child has to be with extra care and attention in constant presence of other family members when the parents are away. Both the parents herein are well qualified and are working for M/s Infosys, one of the leading Software Companies in the private sector. During the course of hearing, a query posed by this Court to father of child, that given his nature of work which also involves travelling, who would look after the minor daughter in his absence and/ or during his home working hours (since claim is that he can work from home too). It was stated that paternal aunt of the father of minor daughter stays nearby and she frequently visits and would continue to visit to look after the minor daughter. The paternal grandmother of the minor daughter is since deceased. It is only the

grand father and the father of the minor daughter who live with her at the paternal house of respondent No.4. Qua the same query, the response of the petitioner was that she has taken a permission from her employer to work full time from home. Also, since respondent No.4 has shifted to his parental home, she had requested her parents to come and reside with her, who are currently staying with her. She along with them is in a better position to look after the daughter full time, while there is no female attendant at the house of respondent no.4 (father).

13. Another aspect that is particularly noteworthy herein is, the tender age of the minor daughter. She is merely four years and ordinarily, per Section 6 of 1890 Act, custody of a minor who is less than five years has to be with her mother. For ready reference, said section is reproduced as under:-

“6. Natural guardians of a Hindu minor- The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”

No doubt, the above provision postulates that the custody shall “ordinarily” be with the mother. But the word “ordinarily” is to be construed to mean that unless, *prima facie*, it is shown otherwise by the father that child would be better taken care of by deprivation of motherhood. Father must then give some cogent reasons, indicative of the welfare and interest of the child being

jeopardized or the exclusive motherhood being imminently non-conducive to the upbringing of child. In the family scenario and circumstances herein, there is no such cogent reasoning forthcoming so as to deny statutory right of a mother. Said motherhood right, in fact, is essentially more for the benefit and welfare of the minor child. Spirit of section 6 hypothesizes that, given the tender age of a minor, suitability of custody is not the predominant factor, what is more relevant or should weigh, is the requisite biological and natural environment, which gives rise to a general presumption that mother is first and best suitable for child care of a minor that age.

14. In the aforesaid background, while there is no dissention with the proposition that respondent No.4 being father of the minor daughter herein, cannot be stated to be in her illegal or unlawful custody, however, since the minor daughter is less than five years, the mother is, therefore, entitled to the benefit of Section 6, *ibid*. That apart, *prima facie*, this Court is of the opinion that until the prayer of the parties qua custody of the minor child is decided by Guardian court, the welfare and interest of the minor child would be better in the hands of mother-petitioner.

15. Having given my careful thought to the entire family set up vis a vis the welfare of the child involved herein and the relevant statutory provisions, I am of the opinion that it may not be desirable to continue the custody of the minor child with respondent No.4. Especially, when the minor daughter since her childhood was with both the parents until in the surreptitious manner she was taken away by the father-respondent No.4 to have her exclusive custody.

16. As regards already filed pending section 25 petition by the respondent no.4, the same also seems to be misconceived. Concededly, the custody of the minor child was already with respondent no.4/father at the time of filing said petition. The very intent and purpose of invocation of the proceedings under section 25, therefore, already stood fulfilled/frustrated at the very inception of the same. From a bare perusal of section 25, it is evident that it is meant to restore the custody of a ward, when removed from the custody of his/her guardian. Said section is reproduced herein below :-

“25. Title of guardian to custody of ward :

(1). If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2). For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3). The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.”

17. It is also made clear that respondent No.4 shall be at liberty to file an appropriate fresh application for temporary/ interim custody keeping in view the paramount interest and welfare of the child. My aforesaid observations are merely preliminary and the Guardian Judge, without being influenced therefrom shall deal with the pending petition under section 25 and proceed

to pass appropriate orders in accordance with law. Since, liberty has already been given to respondent no.4 to file appropriate application seeking custody, it would, therefore, be appropriate at this stage to grant temporary custody of the minor to the petitioner till any further appropriate orders are passed by the Guardian/ Civil Judge.

18. Before parting, this Court would like to also observe that respondent No.4 has laid much emphasis on the past misconduct of the petitioner. Qua the same he has also placed on record manuscript of telephonic conversation (Annexure R-4/1) recorded by respondent No.4 on his cell phone. A cursory glance on the said conversation would reflect that the same has to be scrutinized with care and caution. Not only the same has been sneakily recorded, as stated in the conversation itself, when the petitioner wife noticed something fishy and questioned respondent No.4 pointing as to why had he kept speaker of his cellphone on? To this, respondent No.4, smartly replied that he was eating something and, therefore, he had kept the speaker on ! This exchange is right at the beginning of the recording. Be that as it may, such an undercover conduct of husband to record private spousal conversation without knowledge of the other is an infringement of privacy and can hardly be appreciated. Without going into personal details of conversation or commenting on the merits thereof, *prima facie*, it seems that respondent No.4 knowing that conversation was being recorded, contrived a situation to instigate the petitioner to elicit the desired response, which could later be used as a piece of evidence not only to belittle the petitioner but also to buttress his allegations that she is a stubborn and short tempered lady. It is rather unfair that respondent No.4, who would otherwise claim to be a law abiding citizen and interested not to deprive her minor daughter of the

special care and attention, which she so deserves, would deprive the child of her mother by indulging in such guileful means so as to record conversation arising out of matrimonial discord. Such stealthy conduct does not support his case in respect of welfare and interest being better looked after by him alone, by depriving the mother of custody of her daughter and/ or depriving the daughter of her biological/ natural needs which a mother can only provide, given that daughter is less than 5 years. It is, however, made clear that these observations are mere *obiter dictum* in nature. The same would not effect the merits of the permanent custody petition which has been filed by respondent No.4 and/or interim custody application, if chosen to be filed by him, per liberty granted by this Court. The Guardian/ Civil Judge shall not get influenced with these tentative observations while deciding either of those on their own merits.

19. In the light of aforesaid discussion and the reasoning contained therein, following orders/ directions are passed:-

(i) respondent no.4 is directed to hand over the custody of minor daughter Trisha to petitioner between 5:30 p.m. to 6:30 p.m. on 02.06.2020 at the residence of her mother from where she was removed;

(ii) liberty is granted to respondent No.4 to file an appropriate interim custody application and till the same application is decided, the custody of the minor daughter shall remain with the mother;

(iii) during pendency of the custody petition before the Guardian Judge/ Civil Judge, respondent No.4-father shall be provided access to his minor daughter between 6:00 p.m. to 8:00 p.m. on every Saturday and Sunday and the petitioner shall ensure that respondent No.4 is properly treated and

allowed to meet their minor daughter; the respondent no.4 shall intimate the petitioner in advance in the event he is unable to meet his daughter on certain days/weekends;

(iv) respondent no.4 shall continue to provide the medical care and treatment to the minor girl Trisha and bear the expenses as before and, as and when required, the petitioner shall by mutual co ordination hand over temporary custody to the respondent no.4 for the said medical purpose and after medical check up the respondent no.4 shall drop Trisha back at her mothers residence in Panchkula;

(v) the petitioner shall be at liberty to approach the Station House Officer, Police Station Sector-20 Panchkula before whom a complaint dated 22.02.2020(Annexure P-2) was filed, to seek help, if needed, for restoration of custody of the minor daughter. In view of inter-territorial State jurisdiction, the SHO concerned may take appropriate action, if required, by deputing police officials at border of Panchkula-Zirakpur with the appropriate request to Station House Officer, Zirakpur to likewise render appropriate help at his end to bring the child at the Panchkula—Zirakpur border from the paternal home of respondent No.4 in company of her father-respondent no.4 and to hand over the child to her mother, in the event respondent No.4 does not personally go to handover the custody of the minor child at the Panchkula residence of petitioner.

20. The writ petition stands disposed of in above terms.

01.06.2020
Jiten

(ARUN MONGA)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No