

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

**246**

**CRWP-5617-2020  
Date of decision: 09.11.2020**

Arvinder Kaur

.....Petitioner

Versus

State of Punjab and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI**

Present : Mr. Vikas Gupta, Advocate  
for the petitioner.

Mr. Bhupender Beniwal, Asstt. A.G., Punjab  
for respondents No.1 to 3.

Mr. D.S. Pheruman, Advocate  
for respondent No.4.

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**ARUN KUMAR TYAGI, J.(ORAL)**

(The case has been taken up for hearing through video conferencing.)

1. The petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus directing respondents No.1 to 3 to get detenue- Amanatbir Singh, minor son of the petitioner (now aged two years) released from illegal custody of respondent No.4 and hand over his custody to the petitioner.

2. The petitioner has averred in the petition that the petitioner was married to respondent No.4 on 07.12.2017 as per Sikh rites and ceremonies and one son named Amanatbir Singh was born out of the wedlock on 12.10.2018. In April, 2019 respondent No.4 went to Abu Dhabi for his job. His family members used to harass and pressurize the petitioner for bringing dowry of Rs.3 lacs. On her refusal to do so the parents of respondent No.4 turned the petitioner out of the

matrimonial home on 04.09.2019 after forcibly snatching the minor child from her. In November, 2019 when respondent No.4 came back to India, the petitioner along with her parents and respectables approached respondent No.4 and requested for giving custody of the minor son to her but all went in vain. Due to tender age of the minor child it will be for the welfare and in the interest of the minor child that its custody be handed over to the petitioner-mother. The petitioner submitted representation dated 30.09.2019 to Senior Superintendent of Police, Tarn Taran but no action has been taken on the same.

3. Notice of the petition was given to the respondents. Respondents No.1 to 3 have not filed any reply/status report in response to the petition.

4. The petition has been opposed by respondent No.4 in terms of reply dated 13.10.2020 filed by respondent No.4. In his reply, respondent No.4 has taken preliminary objection that the District Judge is competent to hold the inquiry by taking the evidence as provided under Section 25 of the Guardians and Wards Act, 1890 (for short, "the GW Act 1890") and Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short, "the HMG Act 1956") and to decide the question of the custody of the child. Therefore, the matter be referred to the District Judge to decide the question whether custody of the minor is to be given to the mother or the father. In his reply on merits respondent No.4 has submitted that the petitioner submitted complaint dated 30.09.2019 against respondent No.4 and his family members to the Senior Superintendent of Police, Tarn Taran. The complaint was referred to the Deputy Superintendent of Police, Tarn Taran. The

petitioner refused to live with respondent No.4 as she wanted to remarry and claimed maintenance on which the matter was compromised and it was agreed that respondent No.4 would pay Rs.1,70,000/- to the petitioner. The custody of the minor child was handed over to respondent No.4 by the petitioner herself in view of compromise dated 14.10.2019 arrived at between the parties. The complaint was filed but even thereafter the petitioner harassed respondent No.4 on which respondent No.4 also served legal notice dated 28.07.2020 on the petitioner not to harass respondent No.4 and to withdraw all her complaints as the matter was already compromised between the parties. Respondent No.4 is maintaining the minor child with all love and affection and did not leave any stone unturned to give all facilities to the minor child to be brought up by the family of respondent No.4. The minor child is living happily with the family of respondent No.4. Respondent No.4 has accordingly prayed that the petition may be dismissed.

5. I have heard Mr. Vikas Gupta, learned Counsel for the petitioner; Mr. Bhupender Beniwal, learned State Counsel for respondents No.1 to 3 and Mr. D.S. Pheruman, learned Counsel for respondent No.4 and have gone through the relevant record.

6. Mr. Vikas Gupta, learned Counsel for the petitioner has argued that in view of Section 6(a) of the HMG Act 1956 the petitioner-mother is entitled to custody of detenue-Amanatbir Singh now aged about two years. Due to its tender age, custody of the minor child with respondent No.4 is not lawful/proper and it will be for the welfare and in the interest of the minor child that its custody is given to the

petitioner-mother. The writ petition for issuance of habeas corpus for handing over custody of the minor child to the petitioner-mother is maintainable and the same is not barred and liable to be dismissed on the ground of availability of alternate remedy of filing petition for custody of the minor child under the HMG Act 1956/the GW Act 1890. Therefore, the petition may be allowed and custody of the minor child may be ordered to be handed over to the petitioner-mother by issuance of a writ of habeas corpus. In support of his arguments, learned Counsel for the petitioner has placed reliance on the observations in ***Gippy Arora Vs. State of Punjab and others (PHHC) : 2012(4) R.C.R.(Civil) 397*** and ***Roxann Sharma Vs.. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93.***

7. On the other hand, Mr. D.S. Pheruman, learned Counsel for respondent No.4 has submitted that custody of minor child with respondent No.4-father, being its natural guardian under Section 6 of the HMG Act 1956, is not illegal. The petitioner has equally efficacious remedy of filing petition under the HMG Act 1956/the GW Act 1890 for custody of the minor child. Therefore, the present habeas corpus petition is not maintainable. Mr. D.S. Pheruman, learned Counsel for respondent No.4 has further argued that the petitioner had given custody of the minor child to respondent No.4 under the compromise dated 14.10.2019. The petitioner, who does not have any independent source of income, cannot properly look after and take care of the minor child who is being properly looked after by respondent No.4 and his parents. In the absence of any material on record to conclude that the minor child is not properly kept by respondent No.4, its custody cannot

be given to the petitioner. Further, 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 by this Court will not be proper. It will be expedient for the welfare and in the best of interest of the minor child that its custody be allowed to continue with respondent No.4 and the petition may be dismissed with direction to the petitioner to avail equally efficacious alternative remedy of filing petition under the HMG Act 1956/the GW Act 1890 for custody of the minor child. In support of his arguments, learned Counsel for respondent No.4 has placed reliance on the observations in ***Dr. Mrs. Veena Kapoor Vs. Varinder Kumar Kapoor (SC) : AIR 1982 Supreme Court 792*** and ***Kiran Rani Vs. Krishan Kumar and others : 1994 (1) Hindu Law Reporter 372 : 1995 (1) RCR (Criminal) 430.***

8. Mr. Bhupender Beniwal, learned State Counsel for respondents No.1 to 3 has submitted that respondents No.1 to 3 will abide by the order of this Court.

9. On consideration of the submissions made by learned Counsel for the parties and perusal of the material on record, I am of the considered view that the petition deserves to be allowed.

10. The question which first arises is as to whether the present habeas corpus petition is liable to be dismissed on the grounds of custody of the minor son with respondent No.4 father, who is his natural guardian under Section 6 of the HMG Act 1956, not being illegal and availability to the petitioner of alternative remedy of filing of petition for custody of the minor son under the HMG Act 1956/the GW Act 1890 before the Guardian/Family Court.

11. Now, it is well settled that writ of habeas corpus can be issued for restoration of custody of a minor to the parent wrongfully deprived of it.

12. In ***Criminal Appeal No. 127 of 2020 SLP (Criminal) No. 7390 of 2019 titled Yashita Sahu Vs. State of Rajasthan and others decided on 20.01.2020*** Hon'ble Supreme Court observed as under:-

*“9. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw vs. Arvand M. Dinshaw & Ors. (1987) 1 SCC 42, Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr. (2017) 8 SCC 454 and Lahari Sakhamuri vs. Sobhan Kodali (2019) 7 SCC 311 among others. In all these cases the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.”*

13. The exercise of extra ordinary writ jurisdiction to issue writ of habeas corpus in such cases is not solely dependent on and does not necessarily follow merely determination of illegality of detention and is based on the paramount consideration of welfare of the minor child irrespective of legal rights of the parents.

14. In ***Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758*** it was observed that in habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its infant

ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. It was further observed that the employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

15. In ***Gaurav Nagpal Vs. Sumedha Nagpal : 2008(4) R.C.R.(Civil) 928*** Hon'ble Supreme Court referred to these observations made in ***Howarth Vs. Northcott : 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758*** and held that the legal position in India follows the above doctrine.

16. In ***Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591***, Hon'ble Supreme Court observed as under:-

*“.....in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children*

*should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court.”*

17. In ***Dr. Mrs. Veena Kapoor Vs. Varinder Kumar Kapoor : AIR 1982 Supreme Court 792*** where this Court without adverting to the question of welfare of the minor child dismissed habeas corpus petition filed by the mother for its custody on the narrow ground that the father's custody is not illegal, Hon'ble Supreme Court held the dismissal to be improper observing that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.

18. It follows from the above discussion that a petition for issuance of a writ of habeas corpus is maintainable to recover the custody of minor child if the minor child is in illegal custody or being detained in custody which would be detrimental to the interest of the minor child. (See ***Gohar Begam Vs. Suggi alias Nazma Begam (1960) 1 SCC 597; Manju Tiwari Vs. Rajendra Tiwari : AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591*** and ***Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104.***) The Supreme Court/High Court can in exercise of its writ jurisdiction under Article 32/226 of the Constitution direct by issuance of a writ of habeas corpus that custody of a minor be given to any other person till decision of the question of its custody by the Guardian/Family Court in accordance with law.(See ***Manju Tiwari Vs. Dr. Rajendra Tiwari, (SC) :AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591;***

*Roxann Sharma Vs. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93; Gippy Arora Vs. State of Punjab and others (PHHC) : 2012(4) R.C.R.(Civil) 397; CRWP No.68 of 2017 titled as 'Kirandeep Kaur Vs. State of Punjab and others' decided on 07.03.2017 and CRWP-3013 of 2020 titled as 'Neha Vs. State of Hayrana and others' decided on 01.06.2020.)* Mere availability of an alternate remedy of filing custody petition under the HMG Act 1956/the GW Act 1890 is no bar to exercise of extra ordinary writ jurisdiction for issuance of a writ of Habeas Corpus. (See *Gohar Begam Vs. Suggi alias Nazma Begam (SC) : (1960) 1 SCC 597; Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104; Smt. Nandita Virmani Vs. Raman Virmani (Delhi HC): 1983 Cri. L.J. 794 and Durgesh Kumar Ahuja Vs. Vineet Khurana and another (Delhi HC) : 1985 Cri. L.J. 1195.*)

19. It follows from the above discussion that the present habeas corpus petition is not liable to be dismissed on the grounds of custody of the minor son with respondent No.4-father not being illegal and availability to the petitioner of alternative remedy of filing custody petition under the HMG Act 1956/the GW Act 1890 and observations in *Dr. Mrs. Veena Kapoor Vs. Varinder Kumar Kapoor : AIR 1982 Supreme Court 792* relied upon by learned Counsel for respondent No.4 are not of any help to respondent No.4.

20. The question which next arises is whether the petitioner-mother is entitled to take custody of the minor son from respondent No.4-father.

21. In view of the observations made by Hon'ble Supreme

Court in *Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591* and *Veena Kapoor Vs. Varinder Kumar Kapoor : AIR 1982 Supreme Court 792*, the question of custody of minor child has to be decided on the paramount consideration of its welfare.

22. As between the parties who are Hindus, the HMG Act 1956 lays down the principles on which custody disputes are to be decided. As per Section 6 (a) of the HMG Act 1956, 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) is the father, in the case of a boy or an unmarried girl and after him, the mother. **However, proviso to Section 6(a) of the HMG Act 1956 provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.**

23. In *Roxann Sharma Vs. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93* Hon'ble Supreme Court observed as under:-

*“12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not*

*disqualify the mother to custody of the child even after the latter's crossing the age of five years.”*

24. In **CRWP-3013 of 2020 titled as 'Neha Vs. State of Hayrana and others' decided on 01.06.2020** while interpreting Section 6(a) of the HMG Act 1956, a Coordinate Bench of this Court observed as under:-

*“13. ....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..... 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.”*

25. In the present case the question of welfare and interest of the minor son has to be judged on the consideration of universally acknowledged superiority of the mother's instinctive selfless love and affection of her children, particularly the infants. The lap of the mother is the natural cradle where the safety and welfare of the infant can be assured and there is no substitute for the same. Mother's protection for the infant is indispensable and no other protection will be equal in measure and substance to the same. No amount of wealth or mother like love can take place of mother's love and care. Motherly care and

affection is indispensable for the healthy growth of the infants.

26. In ***Manju Tiwari Vs. Dr. Rajendra Tiwari, (SC) :AIR 1990 SC 1156*** custody of child aged less than five years was given to mother till decision of question of custody in appropriate guardianship proceedings. In ***Syed Saleemuddin Vs. Dr. Rukhsana : 2001(2) R.C.R.(Criminal) 591*** Hon'ble Supreme Court granted the custody of the children to their mother till the family Court disposed of the petition for the custody of the children. In ***Roxann Sharma Vs. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93*** Hon'ble Supreme Court gave interim custody of minor child below five years to mother who was employed and more qualified than father. In ***Eugenia Archetti Abdullah Vs. State of Kerala : 2005(1) RCR (Civil) 259*** a Division Bench of Kerala High Court observed that for custody of children of less than 3 years lap of the mother is a natural cradle where the safety and welfare of children can be assured and there is no substitute for the same. In that case custody of the minor children below 3 years which was with the father was given to the mother. Similarly a Division Bench of Gujarat High Court in ***Surabhai Ravikumar Minawala Vs. State of Gujarat : 2005 (2) RCR (Civil) 822*** ordered custody of 9 months old child to be given to the mother holding that no amount of wealth can take the place of mother's care and love. In ***CRWP No. 608 of 2008 titled as 'Manjit Kaur Vs. State of Punjab' decided on August 14, 2008*** where a minor child of 9 months was taken away by his grand-parents when their daughter-in-law had come from abroad for a short period, this Court ordered custody of the child to be handed over to the mother leaving the parties to avail their remedies in accordance with law. In ***CRWP-3013***

*of 2020 titled as 'Neha Vs. State of Hayrana and others' decided on 01.06.2020* interim custody of minor daughter aged about 4 years who was in custody of her father was ordered to be given to mother till decision of the petition for custody of the minor child. In *CRWP No.68 of 2017 titled as 'Kirandeep Kaur Vs. State of Punjab and others' decided on 07.03.2017* interim custody of minor son aged about 6 months who was in custody of his father was ordered to be given to mother till the disposal of issue of custody of the minor by the competent Court. In *Gippy Arora Vs. State of Punjab and others (PHHC) : 2012(4) R.C.R.(Civil) 397* interim custody of minor son aged about three and half years who was in custody of father was ordered to be given to mother till decision of the petition for custody of the minor child.

27. In view of Section 6(a) of the HMG Act 1956, the custody of minor son who is now aged about two years has to be “ordinarily” with the petitioner being its mother. The custody of the minor son was with the petitioner till she was thrown out of her matrimonial home. Even though the petitioner is alleged to have given custody of minor child to respondent No.4 under compromise dated 14.10.2019 but the same is claimed not to bear the signatures of the petitioner. Even otherwise, respondent No.4 has not produced any document to prima facie show that the compromise was acted upon by payment of maintenance amount of Rs.1,70,000/- by respondent No.4 to the petitioner and filing of any divorce petition. Even if the petitioner does not have any source of independent income, she is living with her parents. In any case the question as to independent source of income of

the petitioner is not of any legal significance as respondent No.4 will be bound to maintain the minor child wherever it is, even during the period the minor child is in custody of the petitioner. Respondent No.4 has neither pleaded nor placed on record any material to prima facie show that the petitioner is disabled from properly looking after and taking motherly care of the minor son for any reason. Respondent No.4 cannot be said to be in a better position to take care of the minor child aged less than five years as compared to its mother-the petitioner. Respondent No.4 has not given any cogent reasons indicative of the welfare and interest of the minor child being jeopardized by entrusting its custody to its mother or custody of the mother being non-conducive to the proper upbringing, development and growth of the minor son. Therefore, there is no valid ground to deny custody of the minor son who is aged less than five years to its mother-the petitioner. Handing over of custody of the minor child to the petitioner is in fact essential to the welfare and is in the best of the interest of the minor child. No doubt, custody of the minor son with respondent No.4, who being father is his natural guardian, cannot be said to be illegal but due to the minor son being less than five years the mother is entitled to its custody not only as per the statutory right conferred by Section 6(a) of the HMG Act 1956 but also due to the same being essential to the welfare and in best of the interest of the minor son.

28. Even in ***Kiran Rani Vs. Krishan Kumar and others : 1994 (1) Hindu Law Reporter 372 : 1995 (1) RCR (Criminal) 430*** relied upon by learned Counsel for respondent No.4 custody of minor child was ordered to be handed over to the mother till decision of custody

petition by the Guardian Court and in the facts and circumstances of the present case observations therein are not of any help to respondent No.4.

29. In view of the judicial precedents referred to above and the facts and circumstances of the case, I am of the considered view that till the question of custody of the minor child is decided by the Guardian/Family Court, the welfare and interest of the minor child would be better served by entrustment of its custody to its mother-the petitioner.

30. In view of the above discussion, the petition is allowed with the following orders/directions:-

- (i) respondent No.4 is directed to hand over the custody of minor son to the petitioner on 01.12.2020 between 10.00 AM and 11:00 AM at the parental house of the petitioner;
- (ii) in case respondent No.4 fails to do so, respondents No.2 and 3 shall ensure that custody of minor son is immediately handed over to the petitioner by taking over the same from respondent No.4;
- (iii) respondent No.4 shall be at liberty to file petition under the HMG Act 1956/the GW Act 1890 before the Guardian/Family Court for custody of the minor son;
- (iv) the Guardian/Family Court shall decide the question of custody of the minor son uninfluenced by the observations made by this Court by taking into consideration the welfare and best of interest of the minor son; and
- (v) till decision of the custody petition, respondent No.4

shall be entitled to meet the minor son for two hours between 10.00 AM and 05.00 PM or make video calls to the minor son for 15/30 minutes between 05.00 PM and 06.00 PM on every Sunday as may be desired and accordingly conveyed in advance to the petitioner by respondent No.4.

**09.11.2020**

Vinay

**(ARUN KUMAR TYAGI)**  
**JUDGE**

Whether speaking/reasoned : Yes  
Whether reportable : Yes