

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

**CRWP-1423-2019
Date of decision: 03.11.2020**

Mandeep Kaur

.....Petitioner

Versus

State of Punjab and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Argued by : Mr. Divjyot S. Sandhu, Advocate
for the petitioner.

Mr. Pawan Sharda, DAG, Punjab
for respondents No.1 to 3.

Mr. Naresh Jain, Advocate
for respondents No.4 and 5.

ARUN KUMAR TYAGI, J.

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

1. The petitioner has filed the present petition under Article 226/227 of the Constitution of India for issuance of a writ in the nature of habeas corpus directing respondent No.2 to get detenue-Alizeh Dhalla, minor daughter of the petitioner then aged about two and half years, released from illegal custody of respondents No.4 and 5, hand over her custody to the petitioner and to provide adequate security to the petitioner and her minor daughter.

2. The petitioner has averred in the petition that the petitioner was married to respondent No.4 and one daughter named Alizeh Dhalla was born out of the wedlock. There was matrimonial dispute between the petitioner and respondents No.4 and 5 her husband and mother-in-law. Compromise was effected between them with the intervention of

Panchayat and respectables of the locality and the petitioner started living with respondent No.4. Respondents No.4 and 5 left the petitioner in the matrimonial house and called her parents to stay with her on the pretext that they were to go out of station but subsequently lodged FIR No.0133 dated 16.11.2019 under Sections 457 and 380 of the Indian Penal Code, 1860 with the Police Station City Rampura, Tehsil Rampura Phul, District Bathinda on false and frivolous allegations of committing of theft by them and got the petitioner arrested in the above said case. The petitioner was granted bail vide order dated 18.11.2019. Thereafter, the petitioner requested respondents No.4 and 5 to give custody of the minor daughter to her but they refused. 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 28.11.2019 to Senior Superintendent of Police, Barnala 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 respondents No.4 and 5 in terms of reply dated 16.12.2019 filed by respondent No.4. In his reply, respondent No.4 has taken preliminary objections that custody of the minor child with respondent No.4, who is its natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short, “the HMG Act”) cannot be said to be illegal. Alternative remedy of filing petition for custody of the minor child under the HMG Act/ the

Guardians and Wards Act, 1890 (for short, “the GW Act”) is available to the petitioner. Therefore, the present habeas corpus petition is not maintainable. Respondent No.4 has further pleaded in his reply that in deciding the question of custody of the minor child welfare of the child is the paramount consideration. Respondent No.4 is having good settled business of gold smith. Respondent No.5 is equally participating in the business. Respondents No.4 and 5 have good reputation in the locality. On the other side, the petitioner remained disturbed due to problems in her parental family. FIR No.166 dated 08.05.2019 was registered under Sections 323/342/384/386/508/148/149 of the IPC in Police Station City Barnala against her father. Her brother has matrimonial dispute with his wife. The petitioner along with her parents is also involved in theft of valuables from the house of respondents No.4 and 5. Matrimonial dispute has arisen between the petitioner and respondent No.4 due to interference by her father. Proper care of the minor child cannot be taken by the petitioner and her family members. This was the reason due to which the child got detached from the petitioner and respondent No.4 is taking care of her since her birth. The child is going in a good play school. Respondent No.4 has accordingly prayed that the petition may be dismissed.

5. Replication to the reply of respondent No.4 has been filed by the petitioner. In the replication, the petitioner has submitted that in view of Section 6(a) of the HMG Act mother is entitled to custody of minor child up to the age of 5 years. There being no efficacious remedy for redressal of her grievance by grant of immediate custody of the

minor daughter, present habeas corpus writ petition is maintainable and is not barred and liable to be dismissed on the ground of availability of alternative remedy. The petitioner is well educated having done MCA and can work of her own and provide basic amenities of life and can take proper care of the minor daughter. Respondents No.4 being businessman will be out of the house most of the time and may not be able to look after the minor child. The petitioner has nothing to do with the FIR lodged against her father and matrimonial dispute between her brother and his wife is a personal matter. The petitioner was falsely implicated in theft case by respondent No.4 due to matrimonial dispute. The petitioner has accordingly reiterated her prayer that custody of the minor child may be given to the petitioner.

6. I have heard arguments addressed by Mr. Divjyot S. Sandhu, learned counsel for the petitioner, Mr. Pawan Sharda, learned State counsel for respondents No.1 to 3 and Mr. Naresh Jain, learned counsel for respondents No.4 and 5 and have gone through the relevant record.

7. Mr. Divjyot S. Sandhu, learned counsel for the petitioner has argued that in view of Section 6(a) of the HMG Act the petitioner is entitled to custody of detainee Alizeh Dhalla now aged about three and half years. The petitioner has nothing to do with the FIR lodged against her father and matrimonial dispute between her brother and his wife is a personal matter. The petitioner was falsely implicated in theft case by respondent No.4 due to matrimonial dispute. The petitioner is well educated having done MCA and can work of her own and properly look after the minor child. Due to its tender age, custody of the child with

respondent No.4 is not lawful/proper. The writ petition for issuance of habeas corpus for handing over custody of the minor child to the petitioner 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/the GW Act. Therefore, the petition may be allowed and custody of the minor child may be ordered to be handed over to the petitioner 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 ***Manju Tiwari Vs. Dr. Rajendra Tiwari (SC) : AIR 1990 (SC) 1156; Gippy Arora Vs. State of Punjab and others : 2012(4) R.C.R.(Civil) 397 (PHHC); 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.***

8. On the other hand, Mr. Naresh Jain, learned counsel for respondents No.4 and 5 has submitted that custody of minor child with respondent No.4 who being father is its natural guardian under Section 6 of the HMG Act is not illegal. The petitioner has equally efficacious remedy of filing petition under the HMG Act/the GW Act for custody of the minor child. Therefore, the present habeas corpus petition is not maintainable. Mr. Naresh Jain, learned counsel for respondents No.4 and 5 has further argued that the petitioner has no independent source of income and remains disturbed due to problems in her paternal family. Criminal case has been registered against her father in Police Station City Barnala. Her brother has a matrimonial dispute with his wife. FIR regarding theft from house of respondents No.4 and 5 was

registered against the petitioner and her parents and other family members in which the petitioner remained in custody. The petitioner cannot properly look after and take care of the minor child who is with respondent No.4 since its birth. In the absence of any material on record to conclude that the minor child is not properly kept by respondents No.4 and 5, 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/the GW Act for custody of the minor child. In support of his arguments, learned counsel for respondents No.4 and 5 has placed reliance on the observations in *Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others (SC) : 2019(3) R.C.R.(Civil) 104; Amit Vs. Nirmal Sahu (Allahabad HC) : 2009(5) R.C.R.(Civil) 258; Manjula Jha Vs. Ravindra Nath Jha (Allahabad HC) : 1988(1) HLR 273 and Muthian Sivathanu Vs. Home Secretary, Government of Tamil Nadu and others (Madras HC) : 2014(38) R.C.R.(Criminal) 219.*

9. Mr. Pawan Sharda, 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.

10. 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.

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

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

13. In ***Criminal Appeal No. 127 of 2020 SLP (crl.) 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.”

14. 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.

15. 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.

16. 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.

17. 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.”

18. In *Dr. 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.

19. In *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari (SC) 2019 (3) R.C.R. (Civil) 104 :2019 (7) SCC 42* Hon'ble Supreme Court observed as under :-

“19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians

and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.”

20. It follows from the above discussion that a petition for issuance of a writ of habeas corpus 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 is maintainable. (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 v. Dr. Rajendra Tiwari, (SC) :AIR 1990 SC 1156; Syed Saleemuddin Vs. Dr. Rukhsana :***

2001(2) R.C.R.(Criminal) 591; Roxann Sharma v. Arun Sharma (SC) : 2015 (2) R.C.R. (Civil) 93; Gippy Arora Vs. State of Punjab and others : 2012(4) R.C.R.(Civil) 397 (PHHC); 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/the GW Act 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 (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 : 1983 Cri. L. J. 794 and Durgesh Kumar Ahuja Vs. Vineet Khurana and another : 1985 Cri. L.J. 1195.**)

21. So far as the judgments relied upon by learned counsel for respondents No.4 and 5 are concerned, in **Amit Vs. Nirmal Sahu (Allahabad HC) : 2009(5) R.C.R.(Civil) 258** a false averment had been made by the applicant mother that she was thrown out of the house of her husband on 10-7-2007. The record indicated that the applicant left the house of her husband on 20-11-2005, almost after one month of the child being born. The opposite party had filed an application under Section 9 of the Hindu Marriage Act, 1955 for the restitution of the conjugal rights in which the applicant had filed an application under Section 24 of the Hindu Marriage Act, 1955 for grant of maintenance prior to the filing of the writ petition. In view of these circumstances the Court held that the alleged detention of the child by the father and

natural guardian of the male child was neither illegal nor without any authority of law and that the mother, should have moved an application under Section 6 of the HMG Act since the matter was pending before the Family Court. In ***Manjula Jha Vs. Ravindra Nath Jha (Allahabad HC) : 1988(1) HLR 273*** the petitioner had filed an application under Section 10 of the Guardians And Wards Act, 1890 in the court of the District Judge, Aligarh before filing of the habeas corpus writ petition for custody of son aged six years. Since the petitioner was actually availing the alternative remedy the Court held that the matter in relation to the welfare of the minor could appropriately and effectively be investigated and adjudicated upon by the District Judge before whom the application of the petitioner under the provision of the Guardians and Wards Act, 1890 was pending. In ***Muthian Sivathanu Vs. Home Secretary, Government of Tamil Nadu and others (Madras HC) : 2014(38) R.C.R.(Criminal) 219*** where GWOP No. 2177 of 2011, seeking custody of the child, was filed and the same was pending before the Family Court, Chennai, habeas corpus petition filed by the father for custody of child with mother was dismissed on the ground of availability of alternative remedy. In all these cases litigation-matrimonial or custody petition was already pending before the Family/Guardian Court which was taken into consideration by the High Court in declining exercise of writ jurisdiction. Facts of the present case are different from those of the above-referred cases as the petitioner was not pursuing any such remedy before filing the present habeas corpus petition. Further, 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 detenue-Alizeh Dhalla has to be decided on the paramount consideration of her welfare. Therefore, observations in *Amit Vs. Nirmal Sahu (Lucknow Bench) : 2009(5) R.C.R.(Civil) 258; Manjula Jha Vs. Ravindra Nath Jha (Allahabad HC) : 1988(1) HLR 273* and *Muthian Sivathanu Vs. Home Secretary, Government of Tamil Nadu and others (Madras HC) : 2014(38) R.C.R.(Criminal) 219* relied upon by learned counsel for respondents No.4 and 5 are not of any help to respondents No.4 and 5.

22. 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 daughter with respondent No.4-father not being illegal and availability to the petitioner of alternative remedy of filing custody petition under the HMG Act/the GW Act.

23. The question which next arises is whether the petitioner is entitled to take custody of the minor daughter from respondent No.4.

24. As between the parties who are Hindus, the HMG Act lays down the principles on which custody disputes are to be decided. As per Section 6 (a) of the HMG Act, 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 provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.**

25. In **Roxann Sharma v. 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.”

26. 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, 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.”

27. In the present case the question of welfare and interest of the minor daughter 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.

28. In **Manju Tiwari v. 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 v. 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 : 2012(4) R.C.R.(Civil) 397 (PHHC)*** interim custody of minor son aged about three and half years who was in custody of its father was ordered to be given to mother till decision of the petition for custody of the minor child.

29. In view of Section 6(a) of the HMG Act, the custody of

minor daughter who is now aged about three and half years has to be “ordinarily” with the petitioner being its mother. The custody of the minor daughter was with the petitioner till her arrest in the theft case registered against her and her parents and other family members at the instance of respondent No.4. The question of guilt or innocence of the petitioner in the above said theft case has to be decided on the basis of evidence to be produced before the trial Court and is not required to be gone into by this Court in the present case. The petitioner has nothing to do with the criminal case registered against her father. Matrimonial dispute of her brother with his wife will also be a personal matter. Suffices it to observe here that the petitioner cannot be said to be disabled by these matters from properly looking after and taking motherly care of the minor daughter. Respondent No.4 being businessman has to go out of the house to attend to the business and respondents No.4 and 5 cannot be said to be in a better position to take care of the minor child as compared to its mother-the petitioner. Respondents No.4 and 5 have not given any cogent reasons indicative of the welfare and interest of the minor daughter being jeopardized by entrusting its interim custody to its mother or custody of the mother being non-conducive to the proper upbringing, development and growth of the minor daughter. Therefore, there is no valid ground to deny interim custody of the minor daughter who is aged less than five years to its mother-the petitioner which is in fact essential to the welfare and in the best of the interest of the minor daughter. No doubt, custody of the minor daughter with respondent No.4, who being father is her natural guardian, cannot be said to be illegal but due to the minor

daughter 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 but also due to the same being essential to the welfare and in best of the interest of the minor daughter. In view of these facts and circumstances of the case, I am of the considered view that till the question of custody of the minor daughter is decided by Guardian/Family Court, the welfare and interest of the minor child would be better served by entrustment of its interim 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 daughter to the petitioner on 15.11.2020 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 daughter is immediately handed over to the petitioner by taking over the same from respondents No.4 and 5;

(iii) respondent No.4 shall be at liberty to file petition under the HMG Act/the GW Act before the Guardian/Family Court for custody of the minor daughter;

(iv) the Guardian/Family Court shall decide the question of custody of the minor daughter uninfluenced by the observations made by this Court by taking into consideration the welfare and best of interest of the minor

daughter;

(v) till decision of the custody petition, respondent No.4 shall be entitled to meet the minor daughter on every Sunday for two hours between 10.00 AM and 05.00 PM or make video calls to the minor daughter for 15/30 minutes between 05.00 PM and 06.00 PM as desired and to be conveyed in advance to the petitioner by respondent No.4;and

(vi) respondents No.2 and 3 shall provide requisite protection to the petitioner and the minor daughter against harm at the instance of respondents No.4 and 5 during the period custody of the minor daughter remains with the petitioner.

03.11.2020

Vinay

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned : Yes
Whether reportable : Yes