

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPHC No. 03 of 2021

Reserved on : 23.03.2021

Delivered On : 08.04.2021

Puneet Singh, S/o Indrasen Singh, Aged About 35 Years, R/o House No. 17/72, Subhash Nagar, Delhi, Pin- 110027.

--- Petitioner

Versus

1. State of Chhattisgarh, through the Secretary, Home (Police) Department, Mahanadi Bhawan, Atal Nagar, Nawa Raipur (C.G.)
2. The Superintendent of Police Ambikapur, District- Surguja (C.G.)
3. Harihar Singh, S/o Jhuri Singh, Aged About 61 Years.
4. Meena Singh, W/o Harihar Singh, Aged About 58 Years.

Respondents No. 3 & 4 are R/o Near Syaan Sadan, Power House (North) Namnakala, Ambikapur, District- Surguja (C.G.)

--- Respondents

For Petitioner : Mr. Goutam Khetrapal, Advocate.

For State/Respondents No. 1 & 2 : Mr. Siddharth Dubey, Dy. G.A.

For Respondents No. 3 & 4 : Mr. Anurag Singh, Advocate.

DB: Hon'ble Shri P.R. Ramachandra Menon, Chief Justice & Hon'ble Shri Narendra Kumar Vyas, J.

CAV ORDER

Per Narendra Kumar Vyas, J.

1. The petitioner, who is father of child namely Rudransh Singh, aged about six years, has filed this Writ Petition (Habeas Corpus) under Article 226 of the Constitution of India for releasing

detenue- Rudransh Singh from custody of respondent No. 3 & 4, who are maternal grandfather and grandmother of detenue respectively.

2. The brief facts as projected by petitioner in this writ petition are as follows:-

(a) The marriage of the petitioner was solemnized with Khushboo Singh. After marriage, she was appointed as Rural Medical Assistant in Primary Health Centre, Boriya vide order dated 01.02.2014 and out of their wedlock, one child- Rudransh Singh was borne on 09.09.2014.

(b) The petitioner was working outside the State of Chhattisgarh at New Delhi. The deceased had gone to her matrimonial home at New Delhi but, later on, she left for her place of posting and was residing with her parents. The respondent No. 3 & 4 used to mentally harass his wife, which compelled her to commit suicide on 09.08.2020. It has been further contended that after suicide committed by his wife, it has come to the knowledge of the petitioner that deceased was sexually harassed by some person. This fact is also within the knowledge of respondent No. 3 & 4.

(c) The child- Rudransh Singh is living with his maternal grand-parents. The maternal grand-parents are not taking care of Rudransh Singh. The respondent No. 3 used to beat Rudransh and also subjected him to cruelty and harassment in order to grab money from the petitioner. In view of above facts, the petitioner has prayed that a writ in nature of Habeas Corpus

be issued to respondent No. 2 for releasing detention of Rudransh from custody of respondent No. 3 & 4 and to produce him before this Court.

3. Respondents No. 1 & 2 have filed their reply placing the progress with regard to investigation of the crime, contending that the Sub Divisional Officer (Police) has been directed to investigate the matter on the strength of the complaint dated 02.11.2020 (Annexure P/3). It was further contended that since Crime Investigation Department has already proceeded with the complaint dated 02.11.2020 as such, Sub Divisional Officer (Police) Ambikapur has not further investigated the matter. On death of Khusboo Singh, Merg intimation No. 57/2020 has been recorded, evidence has been collected and on the basis of evidence, material collected during investigation, an offence under Section 304(B) of IPC is made out, therefore, First Information report bearing serial No. 74/2021 has been registered in Gandhi Nagar Police Station, District- Surguja on 05.02.2021.
4. Respondents No. 3 & 4 have filed return contending that the detinue right from birth along with his mother, is living in maternal house, as the relationship between petitioner and his wife was not cordial. Even, the petitioner has not come to celebrate birthday of his child. There was neither any communication of the petitioner with his child nor he has taken any step to take his wife and child to his house. There was no proper love and affection between petitioner and his wife as such, there was no option for deceased except to live in

her parental house. The child was properly taken care by mother, uncle and respondents No. 3 & 4. The expenses were incurred by mother only and every best possible facility of education was provided to child-detenu by his mother and respondents No. 3 & 4.

5. It was further contended that the deceased wife went to her matrimonial house at Delhi, but soon after marriage, conduct of family members of the petitioner was not good as they also harassed her for bringing less dowry. Unnatural behaviour of family members made the deceased with no option, but to leave matrimonial house and since 2014, she was living with her parents.
6. After death of his wife, petitioner never visited at Ambikapur to meet his child and there was neither any communication by the petitioner to his child nor any steps have been taken by the petitioner for welfare of the child. It was further contended by respondents No. 3 & 4 that after death of mother of detenu, they have initiated steps for compassionate appointment of detenu, so that his future after attaining age of majority, is protected. The respondents are taking all possible steps to protect interest of detenu by taking due care, which is clearly established that there is love and affection between respondents No. 3 & 4 with detenu and welfare of child lies on better pedestal with respondent No. 3 & 4. It is worthwhile to mention here that the petitioner and his family members, are already facing criminal charges as such, if custody of the child is handed

over to the petitioner, it will have unwanted impact over the child, further, it will be difficult for him to grow in that atmosphere. It will also not be possible for petitioner or his family members to take care of child as they are undergoing a criminal trial on account of unnatural death of detenue's mother, as such it is prayed for rejection of Habeas Corpus writ petition.

7. We have heard learned counsel for the parties, perused the documents on record with utmost satisfaction.
8. Learned counsel for the petitioner relied upon the judgment of Hon'ble the Supreme Court in the matter of **Tejaswini Gaud & others Vs. Shekhar Jagdish Prasad Tewari & others**¹. Learned State counsel has also relied upon the same judgment.
9. Learned counsel for respondents No. 3 & 4 relied upon the judgment of Hon'ble the Supreme Court in matter of **Yashita Sahu Vs. State of Rajasthan & others**² and **Rajesh K. Gupta Vs. Ram Gopal Agarwala & others**³.
10. The issue required to be decided by this Court is whether on given facts and circumstances, the writ petition for grant of writ of Habeas Corpus of a child is available to the petitioner. It has been well settled that Habeas Corpus proceeding are not to justify or examine legality of custody. It is medium to which custody of the child is addressed to the discretion of the High Court. The Habeas Corpus is prerogative writ which is an

1 (2019) 7 SCC 42

2 (2020) 3 SCC 67

3 (2005) 5 SCC 359

extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or in effective. Otherwise, a writ will not be issued. The present facts of the case have to be examined in the light of the said parameters fixed for issuance of writ of Habeas Corpus by the Hon'ble Supreme Court.

11. From the facts as projected by the parties, it is crystal clear that petitioner is claiming production of the child who is 6 years old from the custody of respondent No. 3 & 4, who are grandparents of child. The respondents No. 3 & 4 have pleaded that they are taking care of child, providing the best facilities, education, food and other facilities, which are necessary for up bringing of a child. It has also been on record that criminal case under Section 304 (B) of IPC has been registered against petitioner and his family members namely, Geeta Singh- mother, father- Indrasen & brother- Praveen Singh Sister-in-law.. Since, the criminal case has been registered against petitioner and his family members, it can be safely said that on account of this criminal case, if petitioner and family members are prosecuted, no one in the family will be available to look after the child, whereas respondents No. 3 & 4 are on a safer position as they are residing peacefully without facing any criminal trial, therefore, they are in a position to look after child- Rudramsh, in a better position, therefore, welfare of the child- Rudransh lies on higher pedestal with the respondents No. 3 & 4. If we seek the dying declaration, though, its correctness or truthness have to be

examined in the course of trial to be conducted in view of FIR registered against the petitioner, we can presume that the deceased was not in comfort position with the petitioner which compelled her to commit suicide. The relevant para of suicidal note reads as under:-

“6 सालों से मैंने बहुत struggle किया बहुत कोशिश की। लेकिन मैंने अपना self respect बेच दिया। मुझे जीने की कोई इच्छा नहीं मैं थक चुकी हूँ। पुनीत तुम और तुम्हारे घर वालों ने मेरे के चलते मुझे परेशान कर रहे हो। लेकिन मैं mentally mar chuki hu । Ab mere jine की himat khatam हो चुकी मैं एक गहरे अंधेरे में डुबने जा रही हूँ।”

12. Apart from filing of criminal case against the petitioner and his family members, we have to examine whether the welfare done by the respondents No. 3 & 4 can be termed as better welfare of child. The respondents No. 3 & 4 have filed copy of school fee (Annexure R/3) which clearly demonstrates that a good amount is being incurred by them for Rudransh which is at present very much required for welfare of Rudransh. As pleaded by respondent No. 3 & 4 that they are providing the best facilities, education, food, taking care of child, which is ordinary comfort contentment and better surrounding for uplifting of a child, therefore, it can be held that the welfare of the child lies with respondents No. 3 & 4 on a higher pedestal.
13. The reasoning assigned by us is fortified from the judgment passed by the Hon'ble Supreme Court in case of **Tejaswini Gaud & others (Supra)** wherein, the Hon'ble Supreme Court held as under:-

“Welfare of the minor child is the paramount consideration

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu (2008) 9 SCC 413, it was held as under:- (SCC pp. 427-28, paras 49-52)

14. The judgment of Hon'ble Supreme Court in **Yashita Sahu (Supra)**, is also in the same line of reasoning wherein, the Hon'ble Supreme Court has also considered that welfare of child is paramount consideration for grant of writ of Habeas Corpus under Article 226 of the Constitution of India. Paragraphs 19 to 21 are as under:-

“Welfare of the child- the paramount consideration

19. We are of the considered view that the doctrine of comity of courts is a very healthy doctrine. If courts in different jurisdictions do not respect the orders passed by each other it will lead to contradictory orders being passed in different jurisdictions. No hard and fast guidelines can be laid down in this regard and each case has to be decided on its own facts. We may however again reiterate that the welfare of the child will always remain the paramount consideration. Welfare of the child – the paramount consideration

20. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then techni-

cal objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

21. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.”

15. The judgment passed by Hon'ble the Supreme Court in **Rajesh K. Gupta (Supra)**, is also on the same line, which has also considered that welfare of the child is paramount consideration for grant of writ of Habeas Corpus. Paragraph 7 of the judgment reads under:-

“7. It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties [see *Veena Kapoor (Dr.) v. Varinder Kumar Kapoor an Syed Saleemuddin v. Dr. Rukhsana*.] It is, therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father.”

16. From above discussion, it is apparent that the onus of welfare of the child lies on higher footing with the respondents No. 3 & 4,

therefore, looking to the facts and circumstances of the case, the law on subject, this Habeas Corpus writ petition filed by the petitioner is liable to be dismissed.

17. The contention put forward by either side, is being considered for deciding the writ of Habeas Corpus and they have liberty to take recourse available to them under the various law including the family law. The observations made by this Court is only for deciding the present writ of Habeas Corpus and parties are free to agitate all the contention raised by them in this writ petition and in turn, the authorities/ Court or any other adjudicating authority will decide the issue raised by either party without being influenced by the observation made by this Court in this judgment in accordance with law.
18. The Habeas Corpus writ petition *sans* merit and is accordingly, dismissed with the aforesaid observation. No order as to costs.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Narendra Kumar Vyas)
Judge