



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.11.2021

Delivered on : 30.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

and

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

H.C.P. (MD) No.1633 of 2021

V.Nathiya

... Petitioner

-vs-

1.The Inspector General of Police,
South Zone,
New Natham Road,
Madurai.

2.The Superintendent of Police,
Madurai District,
Madurai.

3.The Inspector of Police,
All Women Police Station,
Melur Taluk,
Madurai District.

4.The Social Welfare Officer,
Plot No.35, East II Cross Street,
K.K. Nagar,
Madurai - 20.

5.M.Vijay

6.Devika, W/o.Murugesan

7.Sumitha, W/o.Prakash

8.V.Murugesan

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Habeas Corpus, directing the respondents 1 to 3 to produce the body or person of the detenues namely, (Minor) Prajna and Pragathi, D/o.Vijay, aged about 10 years respectively, children of the petitioner before this Court and hand over the custody to the petitioner.

For Petitioner : Mr.K.Mahendran

For Respondent Nos.1 to 4 : Mr.S.Ravi

Additional Public Prosecutor

For Respondent Nos.5 to 8 : Mr.R.Anand



O R D E R

S.VAIDYANATHAN, J.
and
G.JAYACHANDRAN, J.

The petitioner herein is the mother of twin daughters Prajna and Pragathi born on 20.11.2011. The petition is for issuance of Writ of Habeas Corpus directing the respondents to produce her minor daughters before this Court and consequential relief.

2.The case of the petitioner is that, she got married to the fifth respondent (M.Vijay) on 25.03.2010. Her husband - the respondent herein is employed in Wipro GE Health Care at Bangalore. Twin children born to them on 20.11.2011. One of her twin daughter viz., Pragathi suffers from Hydrocephalus in the brain and had underwent surgery thrice. She was subjected to harassment by the fifth respondent and his family members for begetting two female children. Hence, she left the matrimonial home along with her children and living with her parents at Melur. Taking advantage of her separation, before the Family Court, Madurai, the fifth respondent filed H.M.O.P.No.230 of 2019, for divorce under Section 13(1)(1-a) of the Hindu Marriage Act and G.W.O.P.No.109 of 2019 for custody of the children. She filed H.M.O.P.No.443 of 2019 for restitution of conjugal rights before the Family Court, Madurai. On the intervention of elders of the family, the petitioner and the fifth respondent resolved their difference and reunited. As a result, all the proceedings initiated before the Family Court, Madurai, were dismissed for non-appearance.

2.1.After reunion, again, the family members of the fifth respondent started harassing her and refused to spend for her child health care. All the medical expenses to treat the minor girl Pragathi was met out by the parents of the petitioner. They started demanding dowry of Rs.25,00,000/- and insisted to get her share from her father. On 25.06.2021 she was thrown out of the house and not allowed to enter the house. After waiting till evening, she was forced to leave the matrimonial home to her parents house leaving her children. When the petitioner reached her parents house at Melur, considering the welfare of the minor girl children, she along with her parents and relatives came to the fifth respondent house at Madurai to settle the dispute. However, the fifth respondent and her family members refused to take back the petitioner unless she come with money and documents. Her request for time to meet out the demand was declined and her request to give the custody of the minor children was also refused.

2.2.The fifth respondent, who is the husband of the petitioner and father of the minor children, is employed in Bangalore. The mother of the fifth respondent is mentally ill. They are not able to take care of the children. Hence, they have left the children with



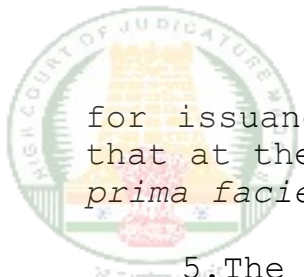
seventh respondent at Thiruppur. At the residence of the seventh respondent, the children are subjected to humility and step motherly treatment. Against the medical advice, the head of Pragathi was tonsured. Knowing this, she contacted the Child Helpline No.1098 and informed about the cruelty caused to her children. Based on her complaint, the fifth respondent was enquired and on his information, the fourth respondent visited the seventh respondent's residence and confirmed the children are with the seventh respondent and not with the fifth respondent.

2.3.Alleging that the children are illegally detained with the seventh respondent, as the mother of the minor twin children legally entitled to keep the custody of the children, had approached this Court by way of Habeas Corpus Petition.

3.On receipt of the notice, the respondents 5 to 8 through counsel, have appeared and submitted that, the children are presently in Madurai with the fifth respondent (father) and the respondents 6 and 8, who are the father and mother of the fifth respondent. The fifth respondent, who is employed at Bangalore, is now working from home in view of Covid restriction. The children are taken care properly by the respondents 5, 6 and 8. They are attending the online class. They are not subjected to any ill treatment as alleged in the Habeas Corpus Petition. Further, the learned counsel for the respondents 5 to 8 argued that the petition itself is not maintainable, since the fifth respondent is the lawful guardian of the minor children. If at all the petitioner need custody of the children, she has to work out her remedy before appropriate forum and a writ petition for issuance of Writ of Habeas Corpus is not the appropriate remedy. In support of his submission the learned counsel for the respondents 5 to 8 relied upon the judgement of the Hon'ble Supreme Court rendered in **Prateek Gupta vs. Shilpi Gupta and others [2018 (2) SCC 309]**.

Maintainability:

4.In the instant case, the petition for issuance of a Writ of Habeas Corpus was filed on the premise that the child was uprooted from the Madurai by the fifth respondent and left with the seventh respondent at Thiruppur, where the children were subjected to torture and humiliation. Factually, the said allegation was found to be partially correct. The representative of fourth respondent (Social Welfare Officer, Madurai), when visited the residence of the seventh respondent at Thiruppur, they found the children with the seventh respondent. Hence, on the date of filing the Petition the children were not in the custody of their parents. Being the mother, the petitioner apprehending danger to the life and limb of the minor children, had approached this Court. The photographs of the minor girls with tonsured head and the alleged WhatsApp messages sent by the children coupled with the medical history of the minor girl Pragathi are the cause for petitioner herein to approach this Court

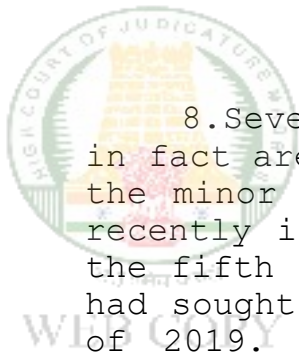


for issuance of a Writ of Habeas Corpus. Hence, this Court holds that at the inception of the petition, the petitioner has made out a *prima facie* case to maintain the Writ of Habeas Corpus.

5.The **Prateek Gupta's case** [cited supra] arose in respect of the custody of a child born at U.S. to Indian parents. In the said case, a child aged about 2 ½ years was removed by the father from U.S., during the subsistence of interim order of U.S. Court granting custody of child to the mother. The child was brought to India by the father and left under the custody of paternal grandparents. The mother filed H.C.P. before the High Court at Delhi, seeking custody of the child. The High Court allowed her H.C.P. and directed the husband to hand over the custody of the child to the Mother. Against the judgment of the High Court, the father preferred appeal before the Hon'ble Supreme Court. While considering the appeal, taking note of the facts such as the minor child born at U.S. and a citizen of US. He was 2 ½ years when uprooted from U.S. and had lived almost half of his life in India at the time of disposal of the appeal the child was 5 years old. The Hon'ble Apex Court observed that, 'there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration.' (Para 51)

6.The judgement of the Hon'ble Supreme Court, nowhere has said that in case of this nature, H.C.P. not maintainable, it has only observed that, 'be it a summary enquiry (like H.C.P.) or elaborate enquiry (like Guardian O.P.) the welfare of the child is of pre-eminent and preponderant consideration, so much so that in undertaking this exercise, the Courts in India are free to decline the relief of repatriation of the child brought within its jurisdiction, if it is satisfied that it (the child) had settled in its new environment or that it would be exposed thereby to physical harm or otherwise, if it is placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return.
[parenthesis added]

7.In the given facts and circumstances, the Hon'ble Apex Court in **Prateek Gupta's case** [cited supra] has held that though the husband has uprooted the child from U.S. despite order of the U.S. Court vesting the custody with mother, the custody of the child with the biological father is not illegal or unlawful warranting immediate restoration of child so as to call for a Writ of Habeas Corpus. The attended circumstances which were broadly highlighted above were the reason for the Hon'ble Apex court to allow the custody of 5 years old male child with biological father with direction to the parties to participate in the pending proceeding initiated by the father relating to the custody of the child.



8. Several observations made in **Prateek's case** [cited supra] are in fact are in favour of the petitioner herein, who is the mother of the minor children and admittedly was taking care and custody till recently i.e., till 25th June of this year. Also records shows that the fifth respondent was not in custody of the children earlier and had sought for custody through legal means by filing G.W.O.P.No.109 of 2019. Therefore, after being satisfied that the facts and circumstances of this case enables the petitioner herein to maintain the Habeas Corpus Petition under Article 226 of the Constitution, seeking custody of the children through summary adjudication, directed the fifth respondent to produce the children before this Court to ascertain what direction will be fit for the welfare of the minor children.

9. Accordingly, the children were produced before this Court. This Court interacted with the parties and the children separately and jointly. In the joint session, the counsels for the respective parties and the Additional Public Prosecutors representing the respondents 1 to 4 were also present.

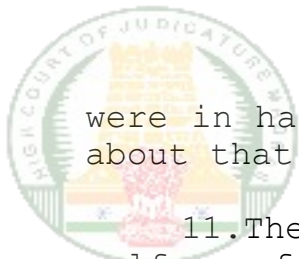
10. The interaction with the parties and the children reveals the following facts:-

(i) The marital relationship between the spouses is not cordial for past two years. The respondent - wife suspects the interference of her in-laws is the cause for the turbulence.

(ii) The earlier break in relationship in 2019 leading to filing of petitions for divorce and custody of children by the husband and the petition for restitution of conjugal rights by the wife was amicably settled by the elders and they have allowed the petitions to dismissed for default. The spouses have reunited during late 2019. However, due to the breakdown of Covid, the husband had come down to Madurai and started working from home. The children were sent to seventh respondent at Tiruppur.

(iii) The husband version for leaving the children at the custody of seventh respondent is to engage the children during the Covid lockdown. Whereas the wife claims that her husband or his parents are not capable of taking care of the children properly, particularly the child Pragathi who needs continuous attention and care. Unmindful of her health condition, she was taken to Tiruppur and ill-treated.

(iv) The children admit that they were sent to Tiruppur. They were taken proper care and were comfortable with their cousins. Presently, they are pursuing 4th Standard in a School at Bangalore. In view of the lockdown, they are attending classes through Online. Even without we asking about the photographs and WhatsApp messages, the girl child Prajna voluntarily say that the photographs of them produced before this Court by their mother were taken without their knowledge when they were attending the online class and they did not sent message to their mother. Since the children are presently with the father, there is no difficulty for this Court to understand that the children were tutored to say so. Being innocent children they



were in hurry to say what they were tutored even before we ask them about that.

11.The factors which are taken into consideration to weigh the welfare of the children :-

- (a) The children are female children aged about 10 years.
- (b) One of the child by name Pragathi has serious health issues and in need of special care.
- (c) The father is employed at Bangalore and he depends on his aged parents to take care of the children.
- (d) The mother is an engineering graduate. Her parents and siblings are financially sound.
- (e) Once the school is open for physical attendance, either the children has to be taken to Bangalore from Madurai or they must be put in some school in Madurai. If the children are taken to Bangalore, the fifth respondent has to take his mother and father along with him to Bangalore so as to take care of the children or he has to engage someone to take care of the female children, who are at the verge of attaining puberty. When the Court enquired the fifth respondent about the probabilities, he says, that if possible he will try to get the permission of his management and work from home.
- (f) The children were with the mother till recently and the separation was recent.
- (g) For the present, it is not certain, whether or not the spouses are going to bury their difference and reunite for the welfare of the children. Either way this Court for the factors stated above, as *Parens patriae* taking note of the facts and circumstances on a holistic manner dispose this petition with the following directions:-

(1) The fifth respondent is directed to hand over the minor children Prajna and Pragathi (both aged about 10 years) to the petitioner to take care of the children, till he leaves to Bangalore to join duty. If the petitioner is willing to join him at Bangalore along with the children it will be a very ideal situation for the welfare of the children as well as the spouses.

(2) In case, the petitioner does not want to join the fifth respondent, the fifth respondent [father of the minor children] shall work out his remedy before appropriate Court of law for the custody of the children, if he so wishes. Till such time, the petitioner herein shall not deprive or prevent the fifth respondent visiting the children on prior intimation.

(3) The petitioner should arrange for the continuation of education of the children under the same School or any other School, which shall not be anyway less than the standard of education they were provided so far.

(4) If the parties not able to amicably settle the issue of <https://hccservices.mca.gov.in/hccservices/> without further intervention of the Court, then in



the future proceedings regarding the custody of the children, no party shall use the observations/finding made in this order, prejudicial to the other party.

12. With the above directions, this Habeas Corpus Petition is allowed.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1. The Inspector General of Police,
South Zone,
New Natham Road,
Madurai.
2. The Superintendent of Police,
Madurai District,
Madurai.
3. The Inspector of Police,
All Women Police Station,
Melur Taluk,
Madurai District.
4. The Social Welfare Officer,
Plot No.35, East II Cross Street,
K.K. Nagar,
Madurai - 20.
5. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.MAHENDRAN, Advocate (SR-36834[F] dated 01/12/2021)

+1 CC to M/s.R.ANAND, Advocate (SR-37136[F] dated 02/12/2021)

H.C.P. (MD) No.1633 of 2021
30.11.2021

NSN(CO)

KB(09.12.2021) 7P 8C