

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
(Heard through VC)**

**CRWP No. 9723 of 2020 (O&M)
Date of Decision: December 20th, 2021**

Pinki Agarwal

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. H.S. Sandhu, Advocate
for the petitioner.

Ms. Rashmi Attri, AAG, Punjab.

Mr. M.S. Sachdev, Advocate,
for respondent No.4.

JAISHREE THAKUR, J.

1. The petitioner has approached this Court by way of filing the instant Criminal Writ Petition seeking a direction in the nature of Habeas Corpus for seeking custody of her minor son Kanav born on 1.1.2018 who has been illegally retained by respondent No. 4, against wishes of the petitioner.

2. In brief, the facts as stated are that the petitioner was married with respondent No. 4 on 11.12.2016, out of which wedlock a minor son was born on 01.01.2018. The marriage was solemnised after a long period of courtship, as the same was opposed by the parents of respondent No. 4, being from a Brahmin community and the petitioner belonging to the Marwari community. The marriage with respondent No. 4 did not survive

long due to the constant interference by the in-laws. The brother of the petitioner would come all the way from Kolkata to try and sort out the differences between the petitioner and respondent No. 4 and his parents. However, the petitioner was thrown out of her matrimonial home on 30.12.2019 and not allowed to attend her son's birthday which was on the very next day i.e. 1.1.2020. It is alleged that respondent No. 4 and his family members told that the petitioner could join the family on fulfillment of demand of ₹ 10 lakhs, which was reduced to ₹ 5 lakhs and as she could not meet that demand she was forced to go to Kolkata. It is also stated that the petitioner along with her brother and brother-in-law came to Jalandhar and visited the house of the petitioner, however no fruitful solution came about. On 3.3.2020 she was denied entry in the house and also not allowed to meet her minor child. A DDR was registered with the police station in this regard. On account of threats being extended, the petitioner and her brother returned to Kolkata on 4.3.2020. It is further alleged that the petitioner tried to reach the respondent—husband many times but to no avail. Being denied access to her minor child, this Criminal Writ Petition has been filed seeking the custody of the minor child.

3. Mr. Harpreet Singh Sandhu, learned counsel appearing on behalf of the petitioner would contend that by virtue of Section 6 of the Hindu Minority and Guardianship Act 1956 (**'the Act of 1956'** for short), the custody of a child under the age of 5 years is to remain with the mother. It is argued that the petitioner has been deprived of her minor child, who being of a very tender age will require all the nurturing and care as can be given only by a mother. It is submitted that the petitioner is well qualified as

a dietician and is able to look after the welfare of the minor child. An affidavit dated 4.12.2021 has been filed stating that the petitioner is earning between ₹30,000/- to ₹35,000/- per month as a dietician.

4. On notice being issued replies have been filed by both the State and respondent no 4.

5. Ms. Rashmi Attri, learned counsel appearing on behalf of the respondent—State submits that the petitioner left the matrimonial home of her own accord, leaving behind the minor child with respondent No. 4 and his mother. It is further submitted that brother of the petitioner came from Kolkata to take her back there for getting her signatures on property papers, but with the assurance that she would be sent back after 5 days. The statement of the Councilor of Ward No. 14 has also been recorded wherein she has stated that respondent No. 4 is a good person and she never heard about any quarrels taking place at the residence of respondent No. 4.

6. Mr. Mandeep Sachdeva, learned counsel appearing on behalf of respondent No. 4 has filed a detailed reply controverting the allegations that the child is in illegal custody. It is, *inter-alia*, argued that respondent No.4 is the father and natural guardian of Kanav and therefore the custody cannot be held to be illegal. It is further submitted that the petitioner left the matrimonial home of her own accord and thereby deserted him and the minor child. It is also submitted that the petitioner herein has not filed any application for custody of the minor child and the petitioner should approach the Guardian court and seek appropriate remedy therein. It is submitted that the instant petition has been filed after a delay of one year and that itself would disentitle her to seek the custody of the child who does

not know her at the present moment. It is submitted that the child is studying in a school and any disruption would not be for his benefit. It is also submitted that WhatsApp chat is available that would reflect that the petitioner herein is not interested in the minor. In fact, respondent No. 4 had to reprimand the petitioner who used to beat the minor. Moreover, all the allegations regarding turning out the petitioner from the matrimonial home on 30.12.2019 and demand of ₹10 lakhs are denied. It is further submitted that the answering respondent had asked the petitioner to come back and join his company but she refused to do so and stated that she would forcibly take away the minor child. It is also alleged that the petitioner would not have the means to support herself as she has filed a petition under Section 125 of the Code of Criminal Procedure seeking maintenance for herself, whereas the answering-respondent is well established in his profession and is working as a Deputy Director with Khalsa College, which is a charitable trust and is earning a gross salary of ₹ 55,000/- per month. In fact, to save his matrimonial life respondent No. 4 has preferred a petition under Section 9 of the Hindu Marriage Act which is pending.

7. I have heard the counsel for the parties and with their able assistance have gone through the pleadings of the case and the law cited.

8. The law is well-settled with regards to a writ petition being maintainable for seeking the custody of a minor child. In this regard, reference may be made to the judgements of the Supreme Court and our own High Court in **Yashita Sahu v. State of Rajasthan, Criminal Appeal No. 127 of 2020 (SLP (Crl.) No. 7390 of 2019) Decided on 20.01.2020, Manju Tiwari v. Dr. Rajendra Tiwari (SC) : AIR 1990 (SC) 1156;**

Gippy Arora v. State of Punjab and others : 2012 (4) RCR (Civil) 397, CRWP-3013 of 2020 titled as Neha v. State of Haryana and others 2020 (4) RCR (Civil) 643, Mandeep Kaur Versus State of Punjab and others 2021 (1) RCR (Civil) 152 and Ramita Rani Versus State of Punjab and others 2021 (2) RCR (Civil) 299. Though counsel for the respondents would argue that when there is alternate remedy available, as in filing an application for custody under the Hindu Minority and Guardianship Act, 1956, then the same must be availed of. Reliance has been placed on the judgment rendered by this Court in **Criminal Writ Petition No. 4587 of 2020 titled Simranjeet Kaur Versus State of Punjab and others decided on 6.7.2020.** However, it is the firm opinion of this court that a writ in the nature of Habeas Corpus would be maintainable in some cases, since it is *one* of the most efficient means to get custody of a minor child, as court proceedings *per se* do tend to take some length of time to get decided.

9. The arguments of respondent No.4 that there are WhatsApp messages available which would reflect that the petitioner was not interested in the minor and the argument raised that there is a delay in filing of these proceedings, are not sustainable. The WhatsApp messages are to be proved by way of evidence and as far as the question of delay is concerned, the petitioner approached the Police Station at Rama Mandi Jalandhar in March, 2020 to get a help from the police to get custody of the minor and was told to take appropriate remedy in accordance with law. Thereafter, on account of Covid pandemic and Lockdown, the courts remained shut till 31.5.2021 and reopened with restricted working. This petition came to be

filed in November, 2020 and therefore it cannot be said that there is a delay. The argument that the mother of respondent No.4 is residing with the said respondent and is looking after the minor child will also be of no avail, as there can be no substitute for a mother's love, guidance and even firmness. Moreover, the allegation that the petitioner has hurt the minor child remains unsubstantiated.

10. Section 6 of the Act of 1956 stipulates that custody of a minor who is less than five years has to be with her/his 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.**" (Emphasis supplied)."*

As per the Act of 1956, the custody of a minor, who has not completed the age of 5 years, shall ordinarily be with the mother, unless it can be established that the mother is incompetent or unable to look after the minor. A mother plays an important role in shaping, in nurturing and moulding a young tender mind. She is in fact the child's first teacher, guide and mentor and provides a safe emotional haven to her children. There is a presumptive truth that a mother is better suited to fulfil the needs of a minor, unless proved to the contrary. The term 'Welfare of the Child' has a wide connotation and cannot be limited to fulfilling the financial needs only. It is

in this background that the legislature in its wisdom has tried to ensure that the custody of a minor child who has not attained the age of 5 would remain with the mother.

11. In the present case, the minor is almost 4 years old as on date, since he was born on 1.1.2018. In these proceedings and without evidence, it is difficult for this court to establish as to whether the petitioner was thrown out of her matrimonial home as claimed by her, or she deserted it of her own accord leaving her minor child behind. Reconciliation and mediation between the parties seems to have failed and therefore the primary concern of this court is to ensure the welfare of the minor child. That is the only consideration at the present moment. The case law as cited by either counsel regarding handing over custody to the petitioner or allowing the father to retain the minor's custody may not be relevant to the facts in hand. In fact, any decision taken on a custody matter is inherently exercised in discretion, case-to-case unique circumstances regarding each child, especially in the case of a minor under the age of 5, who would be hesitant in giving his option to a stranger i.e. Court. **In Mausami Moitra Ganguli v. Jayant Ganguli reported in (2008) 7 SCC 673, the Supreme Court, in paragraphs 19 to 22 has held as follows:**

“19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the

Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the back ground of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In Rosy Jacob v. Jacob A. Chakramakkal a three-Judge Bench of this Court in a rather curt language had observed that: (SCC p.855, para 15)

15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is

expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

12. No doubt, the minor child is studying in a school and is being well looked after by his father and the grandmother and respondent No.4 has offered to allow the petitioner to meet the child as and when she wants and also during holidays and would also disburse the expenses towards her travel to and fro Kolkata (as per the affidavit dated 2.12.2021 filed and taken on record), but the same will not be in consonance with the provisions of Section 6 of the Act of 1956, especially when there is nothing on the record to establish that the petitioner—mother would be an unfit parent. Bald allegations made by respondent No.4 are totally unsubstantiated. Therefore, this court has no hesitation in allowing the writ of Habeas Corpus and directing the custody of the minor child to be handed over to the petitioner.

13. Respondent no 4 would always be at liberty to approach the Civil Court for custody of the child and should the same is filed, the concerned court is hereby expected to decide the application for interim custody within a period of three months from the date of filing of such application.

14. The custody of the minor child to be handed over to the petitioner within a period of four weeks from today, as travel arrangements will have to be made by her to come from Kolkata. The petitioner shall inform respondent No.4 of the date and time she will be present at Jalandhar to take custody and respondent No.4 shall make himself available with the

child. If respondent No.4 fails to comply with the order, the petitioner will be at liberty to take the help of the police along with a lady constable/or a member of the Child Welfare Committee.

15. The petition stands allowed on the above terms.

December 20th, 2021
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned :	Yes
Whether Reportable :	No